APPENDIX

In The

Supreme Court of the United States

October Term, 1973

No. 73-1216

Interstate Commerce Commission,

Appellant

v.

Oregon Pacific Industries, Inc.; Arthur A. Baker Co.; Timberland Lumber Co.; Chapman [illegible] North Pacific Lumber Co.; and American [illegible] National Lumber Co.,

Appellees

On Appeal from the United States District Court for the District of Oregon

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1210

INTERSTATE COMMERCE COMMISSION,
Appellant

—v.—

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

The motion of Western Railroad Traffic Association for leave to file a brief, as *amicus curiae*, is granted. In this case probable jurisdiction is noted.

APRIL 29, 1974

UNITED STATES DISTRICT COURT

Civil Docket 73-386

GOODWIN, EAST, SKOPIL

Jury demand date:

[Received May 10, 1974, Office of General Counsel]

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

For plaintiff:

SEYMOUR L. COBLENS
510 Corbett Bldg. (4) 226-6695

For defendant:

JACK G. COLLINS
CHARLES H. WHITE, JR.
ICC
12th & Constitution
Wash., D. C. 20423

Statistical Record	Costs	Date	Name or Receipt No.	Rec	Disb.
J.S. 5 mailed */5/73	Clerk	5-15	#16712 US Treas	15.00	
J.S. 6 mailed 11/5/73	Marshal				15.00
Basis of Action: injunction against enforcement of order of ICC	Docket fee				
	Witness fees				
Action arose at:	Depositions				

DATE	PROCEEDINGS
1973	
May 15	Filed Complaint
15	Filed Motion for Temporary Stay
15	Issued summons
24	Filed Notification and Certificate that this suit requires the formation of a District Court of three judges m-5/24/73 ORS 5/24/73
17	Filed return of service of s/c exec 5/16/73-U.S. Atty
25	Record of hrg on Temporary Restraining Order ORS
25	Filed Mot of Interstate Commerce Commission to Intervene
29	Filed Order designating U.S. Circuit Judge and United States District Judges to determine this cause: GOODWIN, EAST AND SKOPIL m-6/5/73 CHAMBERS
June 6	Filed Order that mot for temporary restraining order be DENIED and Motion of Interstate Commerce Commission to intervene is GRANTED m-6/7/73 ORS 6/7/73
13	Filed Plaintiffs' Trial Brief (copies to Judges)
July 6	Record of Briefing Schedule: final brief due 8/1/73, statement of agreed facts to judge 8/10/73. Order setting oral argument before 3 judge panel 8/16/73 3:00 p.m. (ntfd) ORS
13	Filed deft's Motion for Extension of Time to and incl 8/14/73 in which to answer. (copies to judges)
13	Filed Order granting above motion for extension of time 7/16/73 (copies to Judges) OJS 7/17/73
23	Filed Joint Brief of the USA and the Interstate Commerce Commission (copies to judges)

DATE	PROCEEDINGS
1973	
30	Filed Pltff's Reply Brief (copies to Judges)
Aug. 10	Filed Stipulation of Facts (copies to Judges)
13	Filed Joint Answer of the United States of America and the Interstate Commerce Commission
16	Record of Oral argument-under advisement
Oct. 18	Filed Memorandum of Decision m 10/19/73 (copies to judges) ATG, WGE, ORS 10/19/73
18	Filed Decree that Service Order #1134 entered by ICC 5/3/73 is set aside, vacated and that ICC is permanently restrained and enjoined from enforcement of said Order. Pltffs have and recover costs. m 10/19/73 (copies to judges) ATG, WGE, ORS 10/19/73
24	Filed Bill of Costs
Nov. 8	Filed Taxation of costs of $18.00.
Dec. 17	Filed Notice of Appeal by ICC from Order entered October 19, 1973 (dated October 18, 1973)
19	Mailed conformed copy of Notice of Appeal to Seymour Coblens and Jack Collins
19	Notified all parties, including Court Reporter, of mailing date
1974	
Jan. 15	Filed Release of Record to an Attorney for Twenty-Four Hours m 1/16/74 RCB 1/16/74
Feb. 13	Mailed Record to the Supreme Court
May 6	Filed true copy of Order from Supreme Ct. re jurisdiction

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510 Corbett Building
Portland, Oregon 97204
Telephone: 226-6695

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 73-3866

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

COMPLAINT

Come now Plaintiffs and for their Complaint and on behalf of all others similarily situated, allege as follows:

I

The Plaintiffs are corporations organized and existing under the Laws of the State of Oregon and are all engaged in the wholesale lumber business. In their business they cause the lumber purchased and sold by them to be transported from their source of supply to their customers throughout the United States. The rates charged by railroads for transportation and for ancillary services, including demurrage, determine to a large extent the rate of economic activity in the Northwest and the impact of such rates is vital to the economy of the region and to the Plaintiffs, as well as to all other persons engaged in similar lines of business. The number of such persons affected by the subject matter of this action is so large that it would be impracticable to bring them all before this Court. The Plaintiffs are

fairly representative of the class of persons on whose behalf this action is brought pursuant to Rule 23 of the Federal Rules of Civil Procedure.

II

This action is for an Injunction against the enforcement of an order of the Interstate Commerce Commission and the jurisdiction of this Court is based upon the provisions of 28 USC 2321-2325.

III

On May 8, 1973, the Interstate Commerce Commission purportedly on the basis of its opinion that an emergency exists requiring immediate action to promote car service, issued Service Order No. 1134, effective May 15, 1973. A copy of said Service Order is attached to this Complaint, made a part hereof and marked Exhibit "A".

IV

The said Service Order was issued by the Interstate Commerce Commission without legal authority therefor because:

1. In truth and in fact no "emergency" existed requiring the elimination of Public Hearings and findings of fact by the Commission with respect to the necessity for such order;

2. It applies to the lumber and plywood industries and unreasonably and arbitrarily discriminates against said lumber and plywood industries;

3. The said Order purports to suspend, without public hearing or any other action and without good cause shown, regularly and duly filed tariffs of the Commission relating to joint and through rates for lumber and plywood in violation of 49 USC 6(3); and

4. The said Order, while it purports to deal with car service, in truth and in fact deals with transportation charges and the Commission has no authority to change transportation charges by the issuance of a service order in the manner attempted by the Commission.

V

The enforcement of Service Order No. 1134 insofar as it affects the Plaintiffs, and the class of persons they represent, will cause them irreparable damage, and there is no adequate remedy available to the Plaintiffs other than the action of this Court in annuling and setting aside the provisions of said Service Order and enjoining the enforcement thereof.

WHEREFORE, Plaintiffs pray this Court for a judgment enjoining the enforcement of Service Order No. 1134, and further pray this Court for an Interlocutory Order of Injunction against the said Service Order and for such other and further relief as to the Court may seem just and proper.

/s/ Seymour L. Coblens
SEYMOUR L. COBLENS
Attorney for Plaintiffs
510 Corbett Building
Portland, Oregon 97204
Telephone: 226-6695

TITLE 49—TRANSPORTATION
CHAPTER X—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS
PART 1033—CAR SERVICE

SERVICE ORDER NO. 1134

LUMBER AND PLYWOOD—RESTRICTIONS ON RECONSIGNING

At a Session of the Interstate Commerce Commission, Division 3, held in Washington, D. C., on the 3rd day of May 1973

It appearing, That an acute shortage of boxcars and other freight cars suitable for transporting lumber and plywood exists throughout the country; that certain carriers are unable to furnish adequate supplies of these types of freight cars to shippers located on their lines; that these shortages of freight cars are impeding the movement of many commodities; that many freight cars are held by shippers for excessive periods awaiting loading, unloading, or disposition instructions; that carloads of lumber and plywood are being held for excessive periods awaiting instructions for diversion, reconsignment or other disposition orders; that such practices immobilize large numbers of freight cars needed by shippers for the transportation of other freight; and that the existing demurrage and detention rules, regulations, and practices of the railroads are ineffective to control such use of freight cars. It is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§ 1033.1134 LUMBER AND PLYWOOD—RESTRICTIONS ON RECONSIGNING

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce, and obey the following rules, regulations, and practices with respect to its car service:

(1) *Application*:

(i) The provisions of this order shall apply to intrastate, interstate, and foreign commerce.

(ii) *Definition of Lumber and Plywood*

The term "lumber and plywood" as used in this order means lumber, veneer or forest products as listed in items 57580 to 58450 of Uniform Freight Classification No. 11, I.C.C. 7, or as listed in items 57580 to 58450 of Consolidated Freight Classification No. 23, I.C.C. No. 2, each issued by J. D. Sherson, supplements thereto, or re-issues thereof.

(2) *Holding of Cars for Diversion, Reconsignment, or Disposition Orders Restricted*:

Carload shipments of lumber or plywood held in cars in excess of five days (120 hours), exclusive of Saturdays, Sundays, and holidays listed in Item 25 of General Car Demurrage Tariff 4-J, I.C.C. H-59, issued by B. B. Maurer, supplements thereto, or re-issues thereof, after the first seven a.m. (7:00 a.m.) after notice of arrival of the car at billed destination is sent or given and subsequently forwarded to another destination or delivered to a newly designated consignee upon instructions of the consignee, consignor, or owner, will be subject to the full local or joint (not proportional, reshipping, or transshipping) tariff rate from origin point to hold point in effect on date of shipment plus the full local or joint (not proportional, reshipping, or transshipping) tariff rate from the reforwarding point in effect on the date reforwarding instructions are given

to carrier, plus all other applicable charges previously or subsequently accruing. (See exception.)

(3) *Exception: Cars at Hold Point on May 15, 1973.*

A notice, giving car number and hold point, shall be sent on May 15, 1973, to each shipper, consignee, or other qualified owner of each car of lumber or plywood held awaiting instructions for diversion, reconsignment, or reforwarding on that date, stating that the car will be subject to the bases of charges provided in this order unless diversion, reconsignment, or reforwarding instructions are given to the carrier within five days (120 hours) exclusive of Saturdays, Sundays, and holidays of the effective date of this order. Such notice shall be used in lieu of the arrival notice described in part (2) herein, in computing time on cars at hold points on May 15, 1973.

(b) *Rules and regulations suspended.*

The operation of all rules and regulations, including rates, rules, and free-time periods granted by authority of Part 1, Section 22 of the Interstate Commerce Act, insofar as they conflict with the provisions of this order, is hereby suspended.

(c) *Effective date.* This order shall become effective at 11:59 p.m., May 15, 1973.

(d) *Expiration date.* This order shall expire at 11:59 p.m. July 31, 1973, unless otherwise modified, changed, or suspended by order of this Commission.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies Secs. 1(10-17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10-17), 15(4), and 17(2).)

It is further ordered, That a copy of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the

American Short Line Railroad Association; and that notice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Division 3.

ROBERT L. OSWALD
Secretary

[SEAL]

SEYMOUR L. COBLENS
Attorney at Law
510 Corbett Building
Portland, Oregon 97204
Telephone: 226-6695

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No.

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT

[Received May 22, 1973, Office of General Counsel]

STATE OF OREGON)
) ss:
COUNTY OF MULTNOMAH)

I, ALEX M. CHEATHAM, being duly sworn depose and say:

1. I am the Director of Traffic of Oregon Pacific Industries, Inc., one of the Plaintiffs in the above entitled action, and an fully familiar with rates and charges for lumber and plywood and the Rules and Regulations applicable thereto with respect to rates and charges by railroads throughout the United States.

2. This Affidavit is in support of a Motion for Temporary Stay of the effective date of Service Order No. 1134 issued by the Interstate Commerce Commission on May 8, 1973.

3. Pursuant to 49 USC 6(3) the Interstate Commerce Commission has approved through and joint rates and charges which have been filed and published by the railroads of the United States affecting lumber and plywood. Such publication provides for such charges from points between the Pacific Coast of the United States and points throughout the United States for transportation of lumber and plywood. These through rates provide an economic and efficient rate structure for transportation of lumber and plywood by railroad between those points and are substantially lower than the sum of the various local rates between such points. The effect of Service Order No. 1134 is to destroy the application of the through rates previously existing with respect to lumber and plywood and substantially increase the cost of transportation between points on the Pacific Coast and other points throughout the United States for lumber and plywood, when shipments of such commodities are delayed at diversion points beyond 120 hours. The purported purpose of Service Order No. 1134 is to alleviate a shortage of rail cars which allegedly hinders the transportation system of the United States. To illustrate the effect of this Order there is attached to this Affidavit and made a part hereof a schedule of examples of shipments of lumber and plywood.

4. The economic effect of the order on the Plaintiffs and other similar situated parties will be catastrophic and will seriously and irretrievably affect the economy of the Northwest. The Interstate Commerce Commission does not set forth any specific statutory authority for its actions. I have been advised that there does not appear to be any. While the order is directed specifically against the lumber and plywood industry, there is evidence that more cars are being delayed in the moving of grain for export than by the lumber and plywood industry. To illustrate the irrationality of the order and to demonstrate the fact that the lumber and plywood industry is the victim of the rail car shortage rather than its cause, there is attached hereto a report to the stockholders of the Southern Pacific Railroad by the President of the Southern Pacific, dated May, 1973, set-

ting forth the fact that the prime cause of the car shortage is the shipment of grain to Russia.

5. The Commission has authority to require railroads to return cars to their ownership lines but it has not effectively exercised its authority.

6. The effect of this order is to unreasonably, arbitrarily and without statutory authority require the lumber and plywood industry to perform its business practices within an arbitrary limited time. This limitation is not imposed upon any other industry and in fact is not a reasonable limitation due to many factors beyond the control of the industry.

/s/ Alex M. Cheatham
ALEX M. CHEATHAM

Subscribed and sworn to before me this 15th day of May, 1973.

/s/ Seymour L. Coblens
Notary Public for Oregon
My Commission expires:
12/15/76

TITLE 49—TRANSPORTATION
CHAPTER X—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS

PART 1033—CAR SERVICE

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It is ordered, That:

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It is further ordered, That a copy of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and car hire agree-

ment under the terms of that agreement, and upon the American Short Line Railroad Association; and that notice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Division 3.

ROBERT L. OSWALD
Secretary

[SEAL]

QUARTERLY REPORT TO STOCKHOLDERS

Three months ended March 31, 1973

[Picture]

Full train of new Southern Pacific box cars en route to customers in Oregon

SOUTHERN PACIFIC

The Annual Meeting of Stockholders of Southern Pacific Company will be held May 16, 1973, at Wilmington, Delaware. The report on the meeting will be included in a special "This is Southern Pacific" issue of our company magazine, which will be mailed to stockholders in June.

SOUTHERN PACIFIC COMPANY
One Market Street

TO THE STOCKHOLDERS:

Although the national economy has been running at a good rate so far in 1973, Southern Pacific's first quarter railroad revenues did not show commensurate gains, primarily because of a national freight car shortage which kept us from moving all of the available business. That, along with increased operating costs and delays in getting offsetting freight rate increases, resulted in a decline in net income from 74 cents a share in the first quarter of 1972 to 53 cents a share for the same period this year.

It is particularly disappointing to report a drop in forest products revenue, compared to a year ago, with the building market so active. Lumber and plywood shipments should have gained significantly, but we have been faced since February with an acute shortage of freight cars and our shippers have been forced to use more expensive modes of transportation for some of their shipments. Southern Pacific simply has been unable to get enough of its fleet quickly back on its own lines to move all the forest and paper products traffic we are offered. The same has been true, to a limited extent, for canned food traffic.

Accentuating the problem in recent months, of course, has been the mammoth Russian purchase of U.S. grain. Southern Pacific is not a major grain hauling railroad, so it has not shared in the benefits of the traffic, but the diversion of cars to the grain movement and congestion in many ports and terminals have seriously impeded the normal flow of our freight car fleets.

Southern Pacific is taking active steps to improve equipment supply. Our "TOPS" computer-communications program helps us get much better utilization of cars. We took delivery of 431 freight train cars and 51 diesel locomotives, costing $28.5 million, in the first quarter, and have over 3,200 more cars and 36 more locomotives, costing $87.5 million, on order, many for second quarter delivery.

While Southern Pacific is building its share of cars, it cannot also supply the requirements of the financially distressed members of the railroad industry. The country badly needs some of the changes in transportation policy and regulation which are the subject of bills now before Congress.

We did show railroad operating revenue gains in the first quarter from increased movement of petroleum products, acids and chemicals, ores and concentrates, motor vehicles and parts, and primary metal products. In addition to the decline in forest products, perishables and sugar beets dipped, due to bad weather.

Railroad operating expenses increased even more, however, because of higher wages, health and welfare benefits, maintenance and fuel costs, property taxes, and, significantly, railroad retirement taxes.

The cost increases prompted the industry to file a petition on April 20 with the Interstate Commerce Commission for a 5 per cent freight rate increase, with some specified exceptions. The railroads are urging the Commission to take prompt action because of the pressing need for added revenue.

First-quarter results from other subsidiaries were mixed. Trucking and pipeline revenue gains exceeded cost increases. Property sales improved income from land and natural resources. Start-up costs for our new South-

ern Pacific Communications Company and loss of forest products traffic by Evergreen Freight Car Corporation because of the freight car shortage cut income from miscellaneous operations.

Interest expense was up in the first quarter, because of our new equipment financing programs, while interest income was down because we had less funds to invest. Other non-operating income declined as a result of a greater loss by jointly controlled affiliated companies this year and because of a non-recurring gain from the sale of Western Pacific stock in 1972.

The unfortunate series of explosions April 28 in a group of government rail cars carrying munitions in our big freight yard at Roseville, California, caused an estimated $5 to $6 million damage to rail equipment and facilities. Train service was quickly resumed and the yard will be restored and in normal service by the time you receive this. Most injuries reported were very minor, and there were no fatalities. While causes for the explosions have yet to be determined and investigations are continuing, Southern Pacific's insurance coverage will limit its financial loss or liability to $2.5 million.

Besides getting our railroad back to normal as fast as possible, we have been helping our Roseville neighbors do the same with their homes and businesses which sustained blast damage. We opened a special claims office in Roseville, even before the explosions had ended, to provide emergency funds for their immediate needs.

If the general business activity of the nation continues strong and if we are able to secure the necessary rate relief to offset some of our rising costs, Southern Pacific should have a good year in 1973.

These are times of rapid change, and we hope the added frequency of our communications with the company's owners, through this new quarterly report, will be both interesting and helpful.

/s/ [Illegible]
President and Chief
Executive Officer

San Francisco, May 8, 1973

SOUTHERN PACIFIC COMPANY AND SUBSIDIARIES

CONSOLIDATED NET INCOME

	(Thousands of Dollars*)		
	First Quarter 1973	First Quarter 1972	(Decrease) Increase
OPERATING REVENUES			
Railway	$322,617	$305,512	$17,105
Trucking	25,056	22,786	2,270
Pipeline	10,944	10,077	867
Land and natural resources	2,938	1,211	1,727
Miscellaneous operations	1,376	2,311	(935)
Total	362,931	341,897	21,034
OPERATING EXPENSES			
Railway	295,465	274,752	20,713
Trucking	24,380	22,269	2,111
Pipeline	6,253	5,482	771
Land and natural resources	2,763	1,755	1,008
Miscellaneous operations	1,679	1,263	416
Total	330,540	305,521	25,019
INCOME FROM OPERATIONS	32,391	36,376	(3,985)

* Except per share amounts.

OTHER INCOME			
Miscellaneous rentals	3,173	3,099	74
Gain on sales of property	804	1,645	(841)
Interest	2,378	2,614	(236)
Other non-operating items	(1,362)	486	(1,848)
Total	4,993	7,844	(2,851)
INTEREST EXPENSE	11,379	10,635	744
INCOME BEFORE FEDERAL INCOME TAXES	26,005	33,585	(7,580)
FEDERAL INCOME TAXES			
Current—before investment credit	4,196	7,201	(3,005)
Less investment credit	1,762	2,915	(1,153)
Current—net of investment credit	2,434	4,286	(1,852)
Deferred	9,226	9,434	(208)
Total	11,660	13,720	(2,060)
Income before minority interests	14,345	19,865	(5,520)
Less minority interests	245	231	14
NET INCOME	$ 14,100	$ 19,634	$(5,534)
NET INCOME PER SHARE—Based on Average number of shares outstanding	$ .53	$ .74	$ (.21)

From Pacific Coast Shipping Points, 75000# Minimum Carload	Through Rate	Freight Charges	Freight Charges Based On Local Rates			Resultant Penalty
To Miami, Florida	$ 2.07	$1552.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To St. Louis, Mo.		.50	375.00	
			To Miami	60,000#	.83	498.00	
			To Miami	15,000#	.60	90.00	
		$1552.50				$2260.50	$ 708.00
To Ft. Worth-Dallas, Tex.	$ 1.79	$1342.50	To Marshalltown, Iowa		1.73	$1297.50	
			To Coffeeville, Ks.		.59	442.50	
			To Ft. W.-Dallas	50000#	.44	220.00	
			To Ft. W.-Dallas	15000#	.30	45.00	
		$1342.50				$2005.00	$ 662.50
To Chicago, Illinois	$ 1.81	$1357.50	To Marshalltown, Iowa		1.73	$1297.50	
			To Chicago, Ill.		.50	$ 375.00	
		$1357.50				$1672.50	$ 315.00
To New York, N. Y. (Lbr)	$ 1.91	$1432.50	To Marshalltown, Iowa		1.73	$1297.50	
			To Chicago, Ill.	75000#	.48	360.00	
			To New York	60000#	1.00	600.00	
			To New York	15000#	.63	94.50	
		$1432.50				$2452.00	$1017.50

From Pacific Coast Shipping Points 75000# Minimum Carload	Through Rate	Freight Charges	Freight Charges Based On Local Rates				Resultant Penalty
To New York, N. Y. (Ply)	$ 2.07	$1552.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To Chicago, Ill.	75000#	.48	360.00	
			To New York	60000#	1.00	600.00	
			To New York	15000#	.63	94.50	
		$1552.50				$2452.00	$ 899.50
To San Antonio, Texas	$ 1.79	$1342.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To Coffeeville, Ks.		.59	442.50	
			To San Antonio	50000#	.76	380.00	
			To San Antonio	15000#	.47	70.50	
		$1342.50				$2290.50	$ 948.00
To St. Louis, Mo.	$ 1.79	$1342.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To St. Louis, Mo.		.68	510.00	
		$1342.50				$1907.50	$ 565.00
To: Toledo, Ohio (Lbr)	$ 1.91	$1432.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To Chicago, Ill.	75000#	.48	360.00	
			To Toledo, O.	60000#	.40	240.00	
			To Toledo, O.	15000#	.22	33.00	
		$1432.50				$1930.50	$ 498.00
To Toledo Ohio (Ply)	$201.00	$1507.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To Chicago	75000#	.48	360.00	
			To Toledo, O.	60000#	.44	264.00	
			To Toledo, O.	15000#	.24	36.00	
		$1507.50				$1957.50	$ 450.00

From North Pacific Coast Shipping Points 70000# Minimum Carload	Through Rate	Freight Charges	Freight Charges Based On Local Rates			Resultant Penalty
From Portland, Oregon	.63	$ 441.00	To Roseville, Cal.	.59	$ 413.00	
To San Francisco, Calif.			To San Francisco	.36	252.00	
		$ 441.00			$ 665.00	$ 224.00
From Portland, Oregon	.87	$ 609.00	To Roseville, Cal.	.59	$ 413.00	
To Los Angeles, Calif.			To Los Angeles, Cal.	.58	$ 406.00	
		$ 609.00			$ 819.00	$ 210.00
From Seattle, Washington	.87	$ 609.00	To Roseville, Cal.	.83	$ 581.00	
To San Francisco, Calif.			To San Francisco, Cal.	.36	252.00	
		$ 609.00			$ 833.00	$ 224.00
From Seattle, Washington	1.04	$ 728.00	To Roseville, Cal.	.83	$ 581.00	
To Los Angeles, Calif.			To Los Angeles, Cal.	.58	406.00	
		$ 728.00			$ 987.00	$ 259.00

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

Civil No. 73-386

[Filed June 6, 1973, U.S. District Court, District of Oregon. Robert M. Christ, Clerk. By C. Mundorff, Deputy]

ORDER

On May 8, 1973, the I.C.C. issued Car Service Order No. 1134, pursuant to the emergency power granted it by 49 U.S.C. § 1(15). The order became effective one week later and was issued without notice or hearing. It found that there was an acute shortage of boxcars which was attributable at least in part to the practice of shippers of lumber products of delaying carloads of lumber in transit while arranging for final disposition. The order required carriers to charge the sum of the freight rates from the point of origin to the point of holding and from the point of holding to ultimate destination, rather than the through route. The effect is to increase the overall freight charge by up to 40% in some cases.

Various shippers of lumber and plywood who are affected by the order filed the complaint, seeking an injunction against the enforcement of the order. A three-judge court has been designated pursuant to 28 U.S.C. §§ 2325 and 2284. However, pending the hearing before the three-judge court on the request for a temporary injunction, plaintiffs have petitioned this Court as a single judge to grant a temporary restraining order

against the enforcement of the Car Service Order pursuant to Subsection (3) of § 2284.

The main thrust of plaintiff's argument is that the order in question is not properly a Car Service Order as defined in 49 U.S.C. § 1(10), such as to justify the emergency procedure in Subsection (15) of the same statute. Instead, they say, it is an order affecting a tariff which can only be accomplished through the statutory procedure requiring a hearing. See, e.g., 49 U.S.C. § 15(3). This legal question is a substantial one. The Commission is no doubt correct in pointing out that the order does affect the use to which boxcars are put, mainly by penalizing their use for storing lumber rather than transporting it. Nevertheless, plaintiff's argument is very persuasive. The order obviously changes the method of calculating the tariff on such shipments. The particular problem in question is one that has traditionally been dealt with by demurrage charges, penalties and the like, imposed as part of the tariff. See, e.g., *Turner, D. & L. Lumber Co.* v. *Chicago, M. & St. P. R. Co.*, 271 U.S. 259 (1926).

The Court must weight other factors. The I.C.C. has pointed out that it acted to protect the public interest which is being jeopardized by the boxcar shortage. The public at large is one of the intended beneficiaries of the order. Should a temporary restraining order against the enforcement of the Car Service Order impede efforts to speed up transportation, there is no way this Court could adequately safeguard that interest within the confines of a temporary restraining order. On the other hand, the plaintiff shippers are harmed if the Car Service Order is allowed to remain in effect pending disposition on the merits. They represented that approximately 8% to 10% of their lumber shipments would be subject to the order, and that freight costs account for 50% of their overall cost. However, as far as the Court can determine, there is no reason why plaintiff shippers would not be entitled to refunds of overcharges should the order ultimately be struck down. Of course, subsequent refunds are not likely to undo all of the harm to shippers, for a variety of business reasons. Neverthe-

less, the Court concludes that there is a greater likelihood of irreversible harm by granting a temporary restraining order than by denying one. On balance, this consideration outweighs other factors. The statute itself places emphasis upon irreversible harm, 28 U.S.C. § 2284(3). The legal question is a close one, and must ultimately be decided by a three-judge panel upon the motion for a preliminary injunction.

Accordingly, it is

ORDERED that the motion for a temporary restraining order be DENIED, and it is further

ORDERED that the motion of Interstate Commerce Commission to intervene is GRANTED.

DATED this 6th day of June 1973.

/s/ Otto L. Skopil, Jr.
OTTO L. SKOPIL, JR.
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 73-386

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

Defendants, the United States of America and the Interstate Commerce Commission, answer the complaint as follows:

I.

As to paragraph I, admit that the plaintiffs are engaged in the lumber wholesale business. The remainder of the paragraph, however, being argumentative in nature calls for no reply.

II.

Admit the allegations of paragraphs II and III.

III.

Deny the allegations of paragraphs IV and V.

IV.

Except as expressly admitted, each allegation of the complaint is denied.

V.

In further answer to the allegations of the complaint, defendants deny that the actions of the defendant, Interstate Commerce Commission, challenged in the complaint are erroneous for the reasons specified or for any other reason whatsoever, and further aver that the order of the Commission under attack is valid and lawful in all respects.

WHEREFORE, defendants, the United States of America and the Interstate Commerce Commission, pray that the relief sought be denied and the complaint be dismissed.

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Washington, D.C. 20423

Attorneys for the Interstate Commerce Commission

CERTIFICATE OF SERVICE

I hereby certify that on this, the 10th day of August, 1973, I served copies of the foregoing Joint Answer on counsel for all parties of record by first-class airmail, postage prepaid.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION,
DEFENDANT-INTERVENOR

Civil No. 73-386

STIPULATION OF FACTS

It is hereby stipulated between the parties as follows:

1. This Court has jurisdiction of the parties by reason of service of process and their appearance in this action, and jurisdiction of the subject matter pursuant to 28 USC 2321-2325.

2. Plaintiffs are corporations organized and existing under the laws of the State of Oregon and are all en-

gaged in the wholesale lumber business. In their business they cause lumber and plywood purchased and sold by them to be transported from their sources of supply to their customers throughout the United States. The rates charged by railroads for transportation of lumber and plywood affect to a large extent the rate of economic activity in the Northwest and the impact of such rates is vital to the economy of the region and to the Plaintiffs as well as to all other persons engaged in similar lines of business.

3. On May 8, 1973, the Interstate Commerce Commission, basing its action on the provisions of 49 USC 1(15), without notice, hearing or an opportunity to be heard, issued Service Order No. 1134. A copy of the Order is attached to this Stipulation.

4. Service Order No. 1134 applies only to the transportation of lumber and plywood by railroads and provides that in the event car load shipments of lumber or plywood are held at a transit point more than 120 hours, exclusive of Saturdays, Sundays and holidays, and thereafter forwarded to another destination, or delivered to a newly designated consignee, such shipment will lose the benefit of any applicable through rate from the shipping point to the ultimate destination. Such shipment would be subject to the sum of the local rates which are usually substantially greater in amount. A fair and representative group of examples of the effect of the Order on the cost of transportation of lumber and plywood are shown in the schedules attached hereto, which is the same schedule which was attached to the application for a temporary restraining order.

5. If called as a witness, A. M. Cheatham, Director of Traffic of Oregon Pacific Industries, Inc., one of the Plaintiffs in this action, would testify in accordance with the sworn statement attached hereto, and the parties stipulate that his statement may be considered by this Court in lieu of his oral testimony.

6. The railroads of the United States have been struggling with the problem of boxcar shortages, particularly as they affect the lumber and plywood industries, for over fifty years and the Interstate Commerce Commission has

issued hundreds of Service Orders under 49 USC 1(15) in an attempt to alleviate the problem caused by boxcar shortages.

7. The parties stipulate that the Interstate Commerce Commission has never in the past issued an order pursuant to the claimed authority of 49 USC 1(15), which imposed the sanctions contained in Service Order No. 1134, or which purported to affect the rights of shippers to make use of a joint or through rate in effect pursuant to a duly filed and authorized tariff.

8. Attached to this Stipulation is a copy of a letter written by the Chairman of the Interstate Commerce Commission, dated February 20, 1969, to the Honorable Robert Packwood, U.S. Senate, relating to Service Order No. 1020.

9. Inflation is currently a matter of critical importance in our economy. The Cost of Living Council, in addition to enforcing direct wage and price controls, develops policies to encourage efficient distribution of products as a means to combat inflation. The CLC has recognized that "the long-established lumber marketing practice of shipping unconsigned lumber for sale in route" has resulted in tying up large numbers of box cars.

10. Attached to this Stipulation is a copy of a letter written by the Deputy Director of the Cost of Living Council dated May 3, 1973, to the Chairman of the Interstate Commerce Commission; and a copy of a letter written by the Chairman of the Interstate Commerce Commission dated May 14, 1973, to the Deputy Director of the Cost of Living Council. Both letters were submitted to the Court at the hearing for a temporary restraining order.

11. If called as a witness, Thomas J. Byrne, Chief of the Section of Railroads of the Interstate Commerce Commission, would testify in accordance with the sworn state-

ment attached hereto, and the parties stipulate that his statement may be considered by the Court in lieu of his oral testimony.

/s/ Seymour L. Coblens
SEYMOUR L. COBLENS
Attorney for Plaintiffs

Attorney for Defendant
and Defendant-Intervenor

EXHIBIT ¶ A"

Service Date
May 8, 1973

FR

TITLE 49—TRANSPORTATION
CHAPTER X—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS
PART 1033—CAR SERVICE

SERVICE ORDER NO. 1134
LUMBER AND PLYWOOD—RESTRICTIONS ON RECONSIGNING

At a Session of the Interstate Commerce Commission, Division 3, held in Washington, D.C., on the 3rd day of May 1973.

It appearing, That an acute shortage of boxcars and other freight cars suitable for transporting lumber and plywood exists throughout the country; that certain carriers are unable to furnish adequate supplies of these types of freight cars to shippers located on their lines; that these shortages of freight cars are impeding the movement of many commodities; that many freight cars are held by shippers for excessive periods awaiting loading, unloading, or disposition instructions; that carloads of lumber and plywood are being held for excessive periods awaiting instructions for diversion, reconsignment of other disposition orders; that such practices immobilize large numbers of freight cars needed by shippers for the transportation of other freight; and that the existing demurrage and detention rules, regulations, and practices of the railroads are ineffective to control such use of freight cars. It is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§ 1033.1134 *LUMBER AND PLYWOOD—RESTRICTIONS ON RECONSIGNING*

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce, and obey the following rules, regulations, and practices with respect to its car service:

(1) *Application*:

(i) The provisions of this order shall apply to intrastate, interstate, and foreign commerce.

(ii) *Definition of Lumber and Plywood*

The term "lumber and plywood" as used in this order means lumber, veneer of forest products as listed in items 57580 to 58450 of Uniform Freight Classification No. 11, I.C.C. 7, or as listed in items 57580 to 58450 of Consolidated Freight Classification No. 23, I.C.C. No. 2, each issued by J. D. Sherson, supplements thereto, or re-issues thereof.

(2) *Holding of Cars for Diversion, Reconsignment, or Disposition Orders Restricted*:

Carload shipments of lumber or plywood held in cars in excess of five days (120 hours), exclusive of Saturdays, Sundays, and holiday listed in Item 25 of General Car Demurrage Tariff 4-J, I.C.C. H-59, issued by B. B. Maurer, supplements thereto, or re-issues thereof, after the first seven a.m. (7:00 a.m.) after notice of arrival of the car at billed destination, is sent or given and subsequently forwarded to another destination or delivered to a newly designated consignee upon instructions of the consignee, consigner or owner, will be subject to the full local or joint (not proportional, reshipping, or transhipping) tariff rate from origin point to hold point in effect on date of shipment plus the full local or joint (not proportional, reshipping, or transshipping) tariff rate from the reforwarding point in effect on the date reforwarding instructions are given to carrier, plus all

other applicable charges previously or subsequently accruing. (See exception.)

(3) *Exception: Cars at Hold Points on May 15, 1973.*

A notice, giving car number and hold point, shall be sent on May 15, 1973, to each shipper, consignee, or other qualified owner of each car of lumber or plywood held awaiting instructions for diversion, reconsignment, or reforwarding on that date, stating that the car will be subject to the bases of charges provided in this order unless diversion, reconsignment, or reforwarding instructions are given to the carrier within five days (120 hours) exclusive of Saturdays, Sundays, and holidays of the effective date of this order. Such notice shall be used in lieu of the arrival notice described in part (2) herein, in computing time on cars at hold points on May 15, 1973.

(b) *Rules and regulations suspended.*

The operation of all rules and regulations, including rates, rules, and free-time periods granted by authority of Part 1, Section 22 of the Interstate Commerce Act, insofar as they conflict with the provisions of this order, is hereby suspended.

(c) *Effective date.* This order shall become effective at 11:59 p.m., May 15, 1973.

(d) *Expiration date.* This order shall expire at 11:59 p.m. July 31, 1973, unless otherwise modified, changed, or suspended by order of this Commission.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended: 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies Secs. 1(10-17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10-17), 15 (4), and 17(2).)

It is further ordered, That a copy of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association; and that no-

tice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Division. 3.

ROBERT L. OSWALD
Secretary

From Pacific Coast Shipping Points, 75000# Minimum Carload	Through Rate	Freight Charges	Freight Charges Based On Local Rates			Resultant Penalty
To Miami, Florida	$ 2.07	$1552.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To St. Louis, Mo.		.50	375.00	
			To Miami	60,000#	.83	498.00	
			To Miami	15,000#	.60	90.00	
		$1552.50				$2260.50	$ 708.00
To Ft. Worth-Dallas, Tex.	$ 1.79	$1342.50	To Marshalltown, Iowa		1.73	$1297.50	
			To Coffeeville, Ks.		.59	442.50	
			To Ft. W.-Dallas	50000#	.44	220.00	
			To Ft. W.-Dallas	15000#	.30	45.00	
		$1342.50				$2005.00	$ 662.50
To Chicago, Illinois	$ 1.81	$1357.50	To Marshalltown, Iowa		1.73	$1297.50	
			To Chicago, Ill.		.50	$ 375.00	
		$1357.50				$1672.50	$ 315.00
To New York, N. Y. (Lbr)	$ 1.91	$1432.50	To Marshalltown, Iowa		1.73	$1297.50	
			To Chicago, Ill.	75000#	.48	360.00	
			To New York	60000#	1.00	600.00	
			To New York	15000#	.63	94.50	
		$1432.50				$2452.00	$1017.50

From Pacific Coast Shipping Points 75000# Minimum Carload	Through Rate	Freight Charges	Freight Charges Based On Local Rates				Resultant Penalty
To New York, N. Y. (Ply)	$ 2.07	$1552.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To Chicago, Ill.	75000#	.48	360.00	
			To New York	60000#	1.00	600.00	
			To New York	15000#	.63	94.50	
		$1552.50				$2452.00	$ 899.50
To San Antonio, Texas	$ 1.79	$1342.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To Coffeeville, Ks.		.59	442.50	
			To San Antonio	50000#	.76	380.00	
			To San Antonio	15000#	.47	70.50	
		$1342.50				$2290.50	$ 948.00
To St. Louis, Mo.	$ 1.79	$1342.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To St. Louis, Mo.		.68	510.00	
		$1342.50				$1907.50	$ 565.00
To: Toledo, Ohio (Lbr)	$ 1.91	$1432.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To Chicago, Ill.	75000#	.48	360.00	
			To Toledo, O.	60000#	.40	240.00	
			To Toledo, O.	15000#	.22	33.00	
		$1432.50				$1930.50	$ 498.00
To Toledo Ohio (Ply)	$201.00	$1507.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To Chicago	75000#	.48	360.00	
			To Toledo, O.	60000#	.44	264.00	
			To Toledo, O.	15000#	.24	36.00	
		$1507.50				$1957.50	$ 450.00

From North Pacific Coast Shipping Points 70000# Minimum Carload	Through Rate	Freight Charges	Freight Charges Based On Local Rates			Resultant Penalty
From Portland, Oregon	.63	$ 441.00	To Roseville, Cal.	.59	$ 413.00	
To San Francisco, Calif.			To San Francisco	.36	252.00	
		$ 441.00			$ 665.00	$ 224.00
From Portland, Oregon	.87	$ 609.00	To Roseville, Cal.	.59	$ 413.00	
To Los Angeles, Calif.			To Los Angeles, Cal.	.58	$ 406.00	
		$ 609.00			$ 819.00	$ 210.00
From Seattle, Washington	.87	$ 609.00	To Roseville, Cal.	.83	$ 581.00	
To San Francisco, Calif.			To San Francisco, Cal.	.36	252.00	
		$ 609.00			$ 833.00	$ 224.00
From Seattle, Washington	1.04	$ 728.00	To Roseville, Cal.	.83	$ 581.00	
To Los Angeles, Calif.			To Los Angeles, Cal.	.58	406.00	
		$ 728.00			$ 987.00	$ 259.00

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 73-386

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION,
INTERVENOR-DEFENDANT

AFFIDAVIT

STATE OF OREGON)
) ss:
COUNTY OF MULTNOMAH)

I, Alex M. Cheatham, being duly sworn, depose and say:

I

I am the Director of Traffic for Oregon Pacific Industries, Inc., one of the Plaintiffs in the above entitled action and have been so employed by Oregon Pacific Industries, Inc., for over eight (8) years in that capacity. I have been connected with the transportation business, particularly with reference to lumber and plywood for approximately thirty-three (33) years and I

am fully familiar with the requirements of lumber transportation and the economic and marketing practices of the lumber industries in that connection.

II

Service Order No. 1134 limits the time a carload of lumber or plywood can be held for orders at any point in the United States to 120 hours (5 working days) and still move forward to a final destination on the published through rate; cars held beyond the 120-hour maximum will then be subject to local rates from origin to hold point and local rates from hold point to final destination. The Interstate Commerce Commission has long indicated that the lumber and plywood industry as a whole is the prime offender in delay of freight cars and is thereby one of the major contributors to car shortages throughout the United States. In this statement, I am assuming that the railroads ultimately have as an objective the suspension of all hold points in the United States, and therefore, I am approaching the matter in its total context. I am prepared to refute the argument that the present method of utilization of railroad equipment is wasteful and inefficient, and to show that the elimination of hold points and the imposition of Service Order No. 1134 would put great pressure on our supplying mills to carry much heavier inventories and create great problems for the railroads to provide necessary equipment to service the forest products industry.

III

PRESENT CAUSES OF EQUIPMENT SHORTAGE

Before going into the subject of possible suspension of hold points and imposition of Service Order No. 1134 conditions, it may be well to pinpoint the reasons for current car shortages as I see them:

(1) Inability of railroads to forecast their needs accurately;

(2) The financial inability of many railroads to purchase adequate equipment to service their on-line customers;

(3) A booming economy in which all industries, not just forest products, are putting great pressure upon railroad facilities. The export grain movement in particular has contributed greatly to the current car shortage—stated recently by B. F. Biaggini, President and Chief Executive Officer of the Southern Pacific Transportation Company; and

(4) Inefficiencies within the railroads themselves, leading to a loss of car time in switching, diverting, reconsigning and pulling out empty cars from industry. Most of the railroads have been negligent in forecasting the very rapid shifts in demand for railroad equipment to move lumber. In the past few years, there have been dramatic shifts from loose loaded to packaged lumber in rail car shipments. The result of this market development has meant a very substantial increase in the need for bulkhead flat cars and wide door box cars, suitable for shipment of packaged lumber. This trend was evident as long ago as ten years and the present lack of equipment of this kind can only be attributed to the inability of the railroads to forecast needs in this regard. Within the next five years, it is estimated that as much as 80%-90% of all lumber will move either in a packaged or unitized form and the preparation for an increase in shipments of this magnitude must begin now. However, it is evident the railroads are doing little, if anything, to meet these future needs. One of the problems that contributes substantially to the current car shortage is inefficiency within the railroads themselves. We have many specific examples from our customers of loss of car time in switching, diverting and reconsigning cars. I feel that an aggressive program by the railroads themselves to tighten up their inefficiencies would contribute a great deal to the more efficient use of their equipment.

IV

WHAT IS A WHOLESALER?

In the lumber industry the wholesaler plays two very different and important roles in the marketing of lumber and plywood. First he is the sales manager for producing mills who would find it financially impossible to sell their products to all marketing areas of the United States and second, he is the purchasing agent for retail lumber yards who would find it financially impossible to canvass all producing lumber mills to fill their requirements. It is estimated that 75% of all lumber and plywood produced is sold through the wholesale arm of the lumber industry.

V

WHY ARE RECONSIGNMENT PRIVILEGES AND HOLD POINTS IMPORTANT TO LUMBER MARKETING?

Hold points have been a traditional part of lumber marketing for decades, at least 33 years from my own personal experience, and as a result, certain marketing practices have been developed surrounding this service. During the 1950's the circuitous routings provided by most of the western and midwestern railroads, together with free 15-day holds, led to flagrant abuses of reconsignment privileges. In the early 1960's, circuitous routings were abolished and, together with higher demurrage rates and improved marketing procedures by wholesalers, most serious abuses were eliminated. The character of a wholesaler can be broken down generally into two categories, i.e.:

(1) Firm orders received from customers and placed simultaneously with supplying mills (mill shipments); and

(2) Lumber purchased for his own account and sold at a later date (known generally throughout the industry as a "transit").

Wholesalers receive many firm orders from their customers where final destinations are not given until the lumber has been produced and shipped to hold points. Many of our customers have more than one yard or plant to which they wish lumber shipped, but will defer giving final destination until after the lumber has been shipped. In addition, most wholesalers anticipate a considerable portion of their requirements and will order lumber for shipment to reconsignment points to have stock available for quick sale and delivery to final destination. The flexibility allowed by use of hold points enables the wholesaler to act as a buffer between mill and customer, smoothing out the inventories of both parties and performing an important marketing function. In addition, it should be emphasized that railroad equipment is best utilized when mills can ship their lumber to hold points rather than waiting until final destinations are secured on each shipment. The shortage of railroad equipment tends to be sporadic and the use of hold points allows available equipment to be used when lumber is ready for shipment, not just when lumber is needed by a customer.

VI

IMPACT UPON MILLS

Let us now examine the impact upon the mills and railroads of the elimination of hold points and the imposition of Service Order No. 1134 upon them.

Assuming the railroads were effective in eventually eliminating hold points, and assuming Service Order No. 1134 goes into effect, shipments other than to firm destinations would be too hazardous and would be discontinued almost immediately. With all orders having to be held at the mill level awaiting final destination, the increase in mill inventories would be enormous. Within the parties associated with Oregon Pacific Industries, Inc., in this current litigation, if we assume that the approximate volume of our associates and ourselves is 165,000 carloads of lumber and plywood annually, and that the approximate volume of these associates to reconsignment

points is ⅓rd of the total shipments, which includes shipments incurring no delay or demurrage, this would mean approximately 55,000 carloads or 2.5 billion board feet of additional inventory would have to be carried by our mills on an annual basis to supply us. If we take into consideration that our associates are a small part of the total North American wholesale lumber industry, it can easily be seen that the increase in mill inventories to service present rail markets would be substantial. This shift would create hardships for many mills, particularly those with limited financial sources and yard space. It would force closure of many smaller producers and in turn place an unbearable burden upon larger producers.

VII

IMPACT UPON RAILROADS:

As I have already mentioned, the present use of hold points enables the wholesaler to make shipments not only when lumber is available but when rail equipment is also available. If all orders from mills had to await confirmation of final destination prior to shipment, the pressure upon railroads to provide for more precise shipping schedules would be greatly increased. I suggest, therefore, that the flexibility of hold points insures maximum use of available equipment, particularly during periods of car shortages.

VIII

SUMMARY:

(1) I believe the railroads should deal with the basic causes of current car shortages and not eliminate what we consider an essential service in the marketing of forest products.

(2) The wholesalers will cooperate fully in positive efforts to relieve the car shortage, i.e.: use of most direct routings to final destinations and other methods to increase car utilization.

(3) Suspension of hold points, or the imposition of a 5-day limitation on business transactions to qualify for through rate provisions, would defeat the purpose for which it was intended.

(4) Forcing wholesalers to eliminate "transit" orders from their established business practice of marketing lumber and plywood would impose serious financial and physical handling problems for many of the mills with which we do business.

(5) The present use of hold points enables mills and wholesalers to make shipments if necessary, prior to final sale or destination being received, and insures maximum use of available railroad equipment during periods of car shortages.

(6) The Interstate Commerce Commission has the means to require movement of empty equipment back to ownership lines, but with few exceptions has not at this time done so.

(7) The breaking of the through rate provisions as set forth in Service Order No. 1134 would seriously impair the ability of wholesale members of the lumber industry to exist as a marketing arm of the total forest products industry.

/s/ Alex M. Cheatham
ALEX M. CHEATHAM

Subscribed and sworn to before me this 12th day of June, 1973.

/s/ Susan E. Reid
SUSAN E. REID
Notary Public for Oregon

My Commission expires: 12/28/73.

INTERSTATE COMMERCE COMMISSION

Washington, D.C. 20423

OFFICE OF THE CHAIRMAN

February 20, 1969

Honorable Robert W. Packwood
United States Senate
Washington, D.C. 20510

Dear Senator Packwood:

This is in reply to your letter of February 13, 1969, concerning the boxcar shortage in the Northwest and the adverse effect which it is having on the lumber industry in that area.

We in the Commission are fully aware of the acute shortage of 40-foot (wide door) and 50-foot boxcars. Unfortunately these shortages are not confined to the Northwest, but strongly prevail in all sections of the country. A number of other Congressional inquiries have been received regarding this matter.

As advised, the Commission issued Service Order No. 1020 to become effective February 10. I am enclosing copies of the order, which requires the withdrawal from distribution of 40-foot (wide door) and 50-foot boxcars and directs their return to owners, empty, except if loading is available to stations on or via the owner, or to any destination which is closer to the owner than the point where the cars are loaded. The purpose of the order, of course, is to make available to the owning carriers the type of equipment which is owned by them to meet the needs of shippers whom they serve. In view of the fact that the shortages of the above-mentioned cars are widespread, equity dictates that, in all fairness, the order must apply to cars of all ownerships.

I assure you that our field staff is constantly checking for any misuse of equipment. Excessive holding of cars is not tolerated, although it is sometimes necessary for

military installations to hold certified empty boxcars for loading explosives.

The Commission is strenuously endeavoring to alleviate existing car shortages and to promote maximum utilization of available equipment.

Sincerely,

/s/ Virginia Mae Brown
VIRGINIA MAE BROWN
Chairman

Enclosures

May 14, 1973

Mr. James W. McLane
Deputy Director
Cost of Living Council
Economic Stablization Program
Washington, D. C. 20508

Dear Mr. McLane:

This is in reply to your letter dated May 3, 1973, expressing concern regarding the effect the nation's freight car supply is having on the movement of food and lumber products by railroad.

The following information is submitted regarding the events leading up to the present freight car dilemma. Prior to the announcement of the Russian grain sale, our nation's carriers were reporting a surplus of both boxcars and covered hopper cars, the types used in the transportation of grain, as well as lumber and some food products. Beginning in early October 1972 surpluses began to disappear and shortages were being reported. These shortages grew progressively from week to week until now the average daily shortages of boxcars exceed 13,000 and covered hopper shortages exceed 14,000.

The Interstate Commerce Commission has taken many actions to improve utilization and thereby alleviate shortages. These actions have been directed against both the carriers and the shippers. Service Order No. 1112 required the carriers to give expeditious handling to all traffic and, incidentally, was issued in early October in an effort to forestall the acceleration of shortages as long as possible. We have also issued orders reducing the free time at ports and increasing demurrage on domestic traffic, as well as other orders penalizing shippers for excessively detaining equipment.

It is agreed that there is an urgent need at this time for increased railroad car capacity to move grain. In fact, by our Service Order No. 1117 we authorized the substitution of open hopper cars in lieu of covered hoppers for transporting grain at the same rates applicable

to covered hoppers. This action has placed about 15,000 open hopper cars in the grain trade and has accomplished much in giving many shippers the means of getting their grain to commercial markets or to ports.

It is true that the covered hopper car is the most desirable type of equipment for transporting grain. However, in times of shortages as we are presently experiencing, shippers are happy to get boxcars or, as previously mentioned, in some cases, open hopper cars.

The purpose of our incentive per diem order was basically to encourage the acquirement of plain boxcars, generally referred to as the "work horse of the car fleet." The incentive per diem was imposed only on plain boxcars, the ownership of which has consistently deteriorated over the years. For example, as of January 1, 1963, our nation's carriers owned 578,834 plain boxcars. This number has been reduced to the present ownership of 337,671 cars. In comparison the ownership of covered hopper cars on January 1, 1963, was 69,106 while as of April 15, 1973, the ownership had increased to 145,358. This clearly illustrates the carriers' policy in increasing the ownership of covered hopper cars while allowing their boxcar fleets to deteriorate. Consequently, our action in Ex Parte No. 252 appears logical and necessary to protect shippers of commodities requiring boxcars, including grain, lumber, and food products.

The Union Pacific Railroad has filed a petition with the Commission requesting that it be allowed to use the funds held in escrow to acquire covered hopper cars instead of boxcars. This is presently under consideration and a hearing has been set for June 7 when this and other suggested revisions in the order will be considered.

The use of circuitous routing in the shipping of lumber has been of much concern to this Commission, and while it is recognized that such practice is a long established lumber marketing one for selling lumber en route, it definitely does contribute to poor car utilization. It is pointed out, however, that the existing tariffs permit the shipper to use such routings and as the Interstate Commerce Act provides that the shipper has the right to specify the routing, it is questionable whether we could

by service order deprive the shipper of such right. The Commission has issued orders preventing internal circuitous routing by carriers in order to delay transit time on shipments. We have found little necessity to issue orders of this nature in the past year or two.

On May 8 the Commission issued Service Order No. 1134, the provisions of which restrict the holding of lumber and pulpwood at hold points in excess of five days without being penalized in the application of the through rate. I am enclosing a copy of this order.

I assure you, however, that we are continuing to closely monitor the handling of all commodities in order that necessary actions may be taken to promote maximum utilizaiton of the available car fleet.

Sincerely yours,

/s/ George M. Stafford
GEORGE M. STAFFORD
Chairman

ECONOMIC STABILIZATION PROGRAM
COST OF LIVING COUNCIL
Washington, D.C. 20508

May 3, 1973

[EMBLEM]

Office of
the Deputy Director

Honorable George M. Stafford
Chairman
Interstate Commerce Commission
12th Street and Constitution Avenue, N.W.
Washington, D. C. 20423

Dear Chairman Stafford:

As you know, inflation is one of the most serious problems facing our country at this time. The Cost of Living Council has been given the responsibility to develop a coordinated effort by the Government to combat inflation through the application of direct wage and price controls, actions to enhance supplies of scarce commodities, and policies to encourage greater efficiency in the production and distribution of agricultural and industrial products.

As part of this responsibility, the Council has been examining the policies and procedures of transportation modes that affect wholesale and retail prices, particularly the prices of food and lumber products. In the course of our investigations, we have learned of two situations that tend to inhibit efficiency in the movement of food and lumber products by railroads. My purpose in writing this letter is to request that the Interstate Commerce Commission investigate these situations and take appropriate actions to modify them.

1. To ease prices of grain and livestock feed, the Administration has taken actions to increase the supplies of wheat and corn entering the market. In particular, 110 million bushels of CCC-owned wheat and corn stocks were

sold during March. There is an urgent need at this time for increased railroad car capacity to move this grain to commercial markets, in addition to continuing the movement of grain to ports for overseas shipment. This need could best be met through the addition of covered hoppers to the railroad fleet.

Current ICC regulations prohibit the use of incentive per diem funds to purchase special purpose cars rather than general purpose boxcars. Inasmuch as there will be a continuing and probably increasing need for rapid grain movement in the years ahead, it is advisable in our judgment that incentive per diem fund policies be altered to permit the purchase of special purpose cars such as covered hoppers. I am informed that a number of railroads, including the Union Pacific and the Penn Central, and the National Industrial Traffic League have also recommended this revision in ICC regulations.

I would appreciate it if your staff would consider this recommendation carefully and prepare a report to the Cost of Living Council on the feasibility of effecting such a modified policy.

2. The second situation with which we are concerned is the excessive circuity of routes utilized by shippers in moving lumber from the West Coast. I recognize that this situation stems from the long-established lumber marketing practice of shipping unconsigned lumber for sale in route. However, the obvious result of this practice is to tie up large numbers of boxcars for extended periods and to inhibit rapid turnaround of rail equipment.

I would like to request that the Commission initiate an immediate staff level investigation into the use of circuitous routing in domestic lumber traffic and determine prompt actions that can be taken to increase efficiency in the utilization of freight cars for the movement of lumber products.

I appreciate your cooperation and assistance in these matters. I believe that your prompt action can be of significant assistance in facilitating the movement of these

important commodities and easing inflationary pressures in these industries.

Sincerely,

/s/ James W. McLane
JAMES W. MCLANE
Deputy Director

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 73-386

OREGON PACIFIC INDUSTRIES, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

AFFIDAVIT

I, Thomas J. Byrne, being duly sworn state the following:

I am Chief of the Section of Railroads at the Interstate Commerce Commission, and am also a member of the Railroad Service Board at the Commission. I have been in the position of Chief of the Section of Railroads for three years, and in all have twenty six years of service with the Interstate Commerce Commission. I have also been employed for eighteen years with the Reading Railroad. I am fully familiar with the railroad industry, and with the current operating situation regarding the freight car fleet generally and lumber transportation specifically.

On April 25, 1973, the Railroad Service Board recommended to Division 3 of the Interstate Commerce Commission that a service order be issued restricting the privilege of reconsigning carload shipments of lumber at the balance of the through rate applicable from loading point to ultimate destination to those shipments which had been held at hold or reconsigning points five days or less.

Approximately 50 percent of western lumber is loaded and shipped to a hold and reconsigning point prior to being sold to the ultimate consumer. The tariffs permit reconsigning of this lumber after arrival at hold point subject only to a nominal reconsigning charge and demurrage for detention in excess of 24 hours after notice of arrival is sent or given. Other non-perishable traffic is not ordinarily subject to reconsignment at through rates after arrival at billed destination.

Field reports had disclosed excessive delays to such cars at various hold points. For example, at Beloit, Kansas, on the Union Pacific Railroad, 150 cars out of 447 cars diverted were held in excess of the free time allowed. Individual car detention ranged as high as 22 days (21 days after free time). Fifty-one of the cars held at Beloit during March 1973 would have been subject to the proposed order had it been in effect during that period.

On April 5, 1973, there were 19 cars of lumber held at Beloit for reconsignment—all held in excess of five days. The oldest car had been idle at Beloit for 20 days. Similar examples of excessive car delays to shipments of "hold lumber" had been reported over extended periods by our field personnel.

Prior to the issuance of Service Order No. 1134, field checks disclosed that the average detention of cars of lumber and plywood at hold points was approximately ten days. Individual car delays of 20 to 30 days were frequently found. Checks made subsequent to the issuance of Service Order No. 1134 indicate that the average detention at hold point is now less than five days and that fewer cars are held by shippers a sufficient time to require the assessment of local rates to and from the hold point as provided by the order.

This improved performance represents a substantial improvement in car utilization, a substantial reduction in the turn time on cars used in this traffic, and increased availability of such cars for subsequent shipments.

At the time Service Order No. 1134 was submitted to Division 3 for consideration, the average daily shortages of 40-ft. wide-door, plain boxcars were 651 cars;

of 50-ft. plain boxcars, 2,234 cars. These are the two car types most commonly used for loading of lumber, plywood, and related articles.

Active assistance was being given to the primary origin railroads—the Burlington Northern; Chicago, Milwaukee, St. Paul and Pacific; Southern Pacific; and the Union Pacific—in the form of orders issued by the Car Service Division of the Association of American Railroads, directing the return to owners of cars of these types owned by these two railroads.

In addition, there was a Commission service order in effect—Service Order No. 1132—requiring all carriers to return empty to the Southern Pacific all cars owned by the Evergreen Freight Car Corporation. This fleet of 3,209 50-ft. plain boxcars was built by Evergreen, a wholly-owned subsidiary of the Southern Pacific, for the transportation of lumber and plywood originating on its lines in Oregon and northern California. Normally, these cars are also used for westbound loading from eastern points in order to avoid excess empty mileage and to avoid the accumulation of excessive numbers of cars of this type on the West Coast.

However, at this time the need for these cars was so great as to require their return to the SP, an action which expedited their return to the lumber territory but also had the effect of forcing additional cars to move loaded to the West Coast where, after release, they also became available for reloading with lumber, plywood, etc.

On June 30, 1973, the average daily shortages of plain 40-ft. wide-door boxcars reported by the carriers were 580 cars; of 50-ft. plain boxcars, the average daily shortages were reported to be 2,351, indicating continued

heavy demands for these cars, in excess of supplies, by shippers throughout the country.

/s/ Thomas J. Byrne
THOMAS J. BYRNE

Subscribed and sworn to before me this 20th day of July, 1973.

/s/ Wm. F. Luker
WM. F. LUKER
Notary Public for the
District of Columbia

My Commission Expires June 14, 1977.

[Endorsed: Filed Oct. 18, 1973, Robert M. Christ, Clerk, By C. Mundorff, Deputy]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 73-286

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION, DEFENDANT-INTERVENOR

MEMORANDUM OF DECISION

Before: GOODWIN, Circuit Judge, and EAST and SKOPIL, District Judges[1]

STATEMENT OF THE CASE

On May 8, 1973, the intervenor Interstate Commerce Commission (Commission), basing its action on the provisions of 49 U.S.C. § 1(15), sua sponte, and without notice and hearing, issued its so-called Service Order No. 1134 (Order). The Order has been from time to time continued and is now in effect.

[1] Honorable Alfred T. Goodwin, United States Circuit Judge for the Ninth Circuit, Honorable William G. East, Senior United States District Judge for the District of Oregon, and Honorable Otto R. Skopil, Jr., United States District Judge for the District of Oregon, constituting a statutory three-judge district court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit, dated May 25, 1973.

The plaintiffs instituted these proceedings pursuant to 28 U.S.C. §§ 2321-2325 to annul and enjoin the enforcement of the Order contending, *inter alia*, that:

While the Order purports to deal with car service, it in truth and in fact deals with transportation charges over which the Commission has no authority under § 1 (15) to change in the manner attempted by the Commission; and the Order issued without notice or hearing or good cause shown, suspends regularly and duly filed tariffs of the Commission "relating to joint and through [railroad shipping] rates for lumber and plywood in violation of 49 U.S.C. § 6(3) [sic]." [49 U.S.C. § 15(1)]

JURISDICTION

We note the jurisdiction of this three-judge district court under 28 U.S.C. §§ 2321-2325.

FACTS

We find from the agreed statement of facts and the affidavits filed herein these pertinent facts: Plaintiffs are Oregon corporations all engaged in the wholesale lumber business. In their business, they cause lumber and plywood purchased and sold by them to be transported from their sources of supply to their customers throughout the United States. The rates charged by railroads for transportation of lumber and plywood affect to a large extent the rate of economic activity in the Northwest and the impact of such rates is vital to the economy of the region and the plaintiffs.

Approximately 75 per cent of all the lumber and plywood produced in the Northwestern states is sold through the wholesale arm of the lumber industry. For almost half a century the wholesalers have used a common practice of some form of a diversion or reconsignment of their railroad car shipments while in route from point of origin to or at the original destination under prefixed joint or through railroad shipment rates and charges established under duly filed tariffs as regulated by the Commission under its general powers and appropriate

procedure under the Interstate Railroad Transportation Act, after notice and hearing.

In recent years the practice is generally known as wholesalers' sales-in-transit. The wholesaler will ship a given carload or carloads to a given "hold point" with the view that the car or cars will be ultimately diverted or reconsigned to a more distant point of final destination. The railroad joint or through shipping rate from the point of origin to the ultimate final destination is always substantially less than the combined or aggregate of short haul rates between intermediary points. For example, the through rate for a 7500 lb. minimum carload from Pacific Coast shipping points to New York, via the intermediate points of Marshalltown, Iowa, and Chicago, Illinois, is $1432.50, while the aggregate of the three local rates between points totals $2452.00.

The Order applies only to the transportation of lumber and plywood by railroads and provides that in the event carload shipments are held at a transit point more than 120 hours, exclusive of Saturdays, Sundays and holidays, and thereafter forwarded to another destination, or delivered to a newly designated consignee, such shipment will lose the benefit of any applicable through rate from the shipping point to the ultimate designation. Such shipment would be subject to the sum of the local rates which are as pointed out above usually substantially greater in amount.

The railroads of the United States have been struggling with the problem of boxcar shortages, particularly as they affect the lumber and plywood industries, for over fifty years, and the Commission has issued hundreds of Service Orders under 49 U.S.C. § 1(15) in an attempt to alleviate the problem caused by boxcar shortages. However, the Commission has never in the past issued an order pursuant to the claimed authority of 49 U.S.C. § 1(15), which imposed the severe sanctions upon shippers as contained in the Order, or which purported to affect the rights of shippers to make use of a joint or through rate in effect pursuant to a duly filed and authorized tariff. In comparison, the imposition of tariff regulated reasonable time based demurrage charges for cars held

at a given point over stated times has been a traditional sanction upon shippers to keep the cars rolling.

ISSUE

Whatever authority the Commission may have to alleviate the problem of car shortages by prescribing shipping rates and charges through appropriate procedures, with notice and hearing, is not in issue. The basic and sole issue before the court is whether the Commission had Congressional authority under the "emergency" car service section, Title 49 U.S.C. § 1(15), to promulgate and issue the so-called "car service" Order. We hold that it did not.

DISCUSSION

The authority of the Commission over "car service items" flows from 49 U.S.C. § 1(10), which provides in essential parts, "The term 'car service' * * * shall include the use, * * * movement * * *, and return of * * * cars * * * used in the transportation of property *by any carrier by railroad.* * * *" [Emphasis added.] So it follows that " 'car service' connotes the use to which the vehicles of transportation are put [by a carrier]; not the transportation service rendered by means of them." *Peoria & P.U. Ry. Co.* v. *United States*, 263 U.S. 528, 533 (1924).

Paragraph (14) of § 1 is the enabling section or procedural prerequisite for the issuance of the Commission's car service orders. The purpose of car service orders is best explained in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 472, 743-744 (1972), through this observation of Mr. Justice Rehnquist:

> "The country's railroads long ago abandoned the custom of shifting freight between the cars of connecting roads, and adopted the practice of shipping the same loaded car over connecting lines to its ultimate destination. The freight cars of the Nation thus became in essence a single common pool, used by all roads. This practice necessarily required

some arrangements for eventual return of a freight car to the lines of the road which owned it, and in 1902 the railroads through their trade association dealt with this and related problems in a code of car service rules with which the roads agreed among themselves to comply. The effect of the Commission's order now under review is to promulgate two of these rules as the Commission's own, with the result that sanctions attach to their violation *by the railroads.* [Emphasis added.]

"Because of critical freight-car shortages experienced during World War I, Congress enacted the Esch Car Service Act of 1917, which empowered the Commission to establish reasonable rules and practices with respect to car service by railroads, 40 Stat. 101, 49 U.S.C. § 1(14)(a). The pertinent language of that Act provides:

" 'The Commission may [after hearing] * * * establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter * * *.' " ["including the compensation to be paid * * * for the use of any * * * car * * * not owned by the carrier using it. * * *"]

So we emphasize that § 1(14) contemplates Commission rules and regulations, with respect to car service, applicable with sanctions, to uses of cars *by railroads* and not by shippers.

Section 1(15) gives the Commission four categories of emergency authority when it is of the opinion that shortages of equipment or other emergencies requiring immediate action exist, at once, with or without notice or hearing:

"(a) to suspend * * * rules, regulations, or practices *then existing* [emphasis added] with respect to car service * * *,

(b) to make * * * directions with respect to car service * * * during such emergency as * * * will promote * * * service * * * [and provide compensation *as between carriers*].

(c) to require * * * common use of terminals, * * * and

(d) to give directions * * * for preference or priority in transportation. * * *"

Manifestly the expressed authority to the Commission under either of categories (b), (c) or (d) does not support the Order under challenge. Nor does the expressed authority under category (a) give any validity to the Order. The Order does not purport to suspend any rule, regulation or practice then established in connection with car service. On the contrary the Order condones the practice of sales-in-transit, which involves a form of boxcar warehousing for an indefinite time until a diversion or reconsignment occurs but requires shippers employing this practice to pay a higher ultimate shipping rate to the carriers.

Expressed authority to the Commission for fixing shipping rates and charges during a declared emergency under § 1(15) is utterly lacking and none can be rationally inferred or implied from the express language. It has been held that the "sole purpose" of categories (a) and (b) authority is "to make [railroad cars] available in emergencies to a carrier other than the owner. * * *" *Peoria & P.U. Ry. Co.* v. *United States*, supra, at 533, 534. Also, the section is no general grant of emergency power to prevent interruptions in traffic "and the detail in which the subjects of such power has been specified precludes its extensions to other subjects by implication." 263 U.S. at 535.

The intervenor urges the holding of *Turner, Dennis & Lowry Lbr. Co.* v. *Chicago, M. & St. Paul Ry. Co.*, 271 U.S. 259 at 262, as supportive of the Order. *Turner* did not involve and approve an order issued under § 1 (15), but rather an order involving a "demurrage tariff duly filed." The decision is no authority for the Order challenged herein.

In summary, we point out that the sole purpose and effect of the Order is to deprive lumber and plywood shippers of the benefit of a long-standing railroad shipping practice, approved under prior lawful rate regulation procedures, and the further benefit of the pre-exist-

ing joint and through shipping rates provided therefor; and in turn to substitute for such joint and through rates a combination or aggregate of the local rates between intermediary points resulting in the imposition of sanctions, which approach confiscatory amounts.

The Service Order label and citation of authority therefor does not mask or legitimatize the illegal rate fixing Order developed through procedures lacking due process.

CONCLUSIONS OF LAW

We conclude that the Commission was without Congressional authority to issue the Order under the provisions of § 1(15) and acted arbitrarily and unlawfully in the formation and issuance thereof and that the Order is void from its inception. Accordingly, the plaintiffs are entitled to an Order and Decree herein:

(a) setting aside, vacating and holding for naught the Order in its entirety as of its inception;

(b) restraining and enjoining the Commission and all persons acting on its behalf from the enforcement of the terms and sanctions imposed thereunder; and

(c) allowing plaintiffs' costs.

This Decision shall constitute the court's Findings of Fact and Conclusions of Law as provided in Rule 52(a), Federal Rules of Civil Procedure.

Dated this 18th day of October, 1973.

/s/ ALFRED T. GOODWIN
United States Circuit Judge

/s/ WILLIAM G. EAST
United States District Judge

/s/ OTTO R. SKOPIL, JR.
United States District Judge

[Endorsed: Filed Oct. 18, 1973, Robert M. Christ, Clerk, By C. Mundorff, Deputy]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 73-286

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; AND AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION
DEFENDANT-INTERVENOR

DECREE

Before: GOODWIN, Circuit Judge, and EAST and SKOPIL, District Judges

Based upon the Memorandum of Decision, constituting the court's Findings of Fact and Conclusions of Law, filed herein contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) The Service Order No. 1134 entered by the Interstate Commerce Commission, Division 3, at its session on the 3rd day of May, 1973, in Washington, D.C., under the title of Part 1033-Car Service, in its entirety, is set aside, vacated and held for naught as of its entry;

(2) The Interstate Commerce Commission and all persons acting for and on its name and behalf are permanently restrained and enjoined from the enforcement of said Order in part or its entirety; and

(3) The plaintiffs have and recover costs herein.
Dated this 18th day of October, 1973.

/s/ ALFRED T. GOODWIN
United States Circuit Judge

/s/ WILLIAM G. EAST
United States District Judge

/s/ OTTO R. SKOPIL, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 73-386

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; AND AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, DEFENDANTS

NOTICE OF APPEAL

1. Notice is hereby given that the Interstate Commerce Commission, one of the defendants in the above-entitled action, hereby appeals to the Supreme Court of the United States from the opinion and order of this Court dated October 18, 1973. This appeal is taken pursuant to 28 U.S.C. § 1253.

2. The entire record in this action is hereby designated for certification by the Clerk of the District Court to the Clerk of the Supreme Court. The Clerk of the District Court is requested to prepare and to transmit the entire record to the Clerk of the Supreme Court.

This 14th day of December, 1973.

/s/ Charles H. White, Jr.
CHARLES H. WHITE, JR.
Attorney
INTERSTATE COMMERCE COMMISSION
Washington, D.C. 20423

/s/ Fritz R. Kahn/C.W.
FRITZ R. KAHN
General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this, the 14th day of December, 1973, I served copies of the foregoing Notice of Appeal on counsel for all parties of record by first-class, air-mail, postage prepaid.

/s/ Charles H. White, Jr.
CHARLES H. WHITE, JR.
Attorney

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 548020 270

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No. —

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLAND LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; AND AMERICAN INTERNATIONAL CO.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A., *infra*, pp. 11–20) is reported at 365 F. Supp. 609. The Interstate Commerce Commission's Service Order No. 1134 (App. B., *infra*, pp. 21–24) is unreported.

JURISDICTION

The opinion and judgment of the three-judge district court was entered on October 18, 1973. A Notice of Appeal was filed by the Interstate Commerce Commission on December 14, 1973 (App. C., *infra*, pp.

26–26). The jurisdiction of this Court is conferred by 28 U.S.C. § 1253. *City of Chicago v. United States*, 396 U.S. 196.

QUESTION PRESENTED

Whether the lower court erred in holding that the circumstance that certain carrier practices directly affecting car utilization are embodied in their tariffs and affect the charges paid by shippers thereby deprives the Interstate Commerce Commission of the power to issue a car service order under Section 1(15) of the Interstate Commerce Act, temporarily suspending that practice, as an emergency measure to alleviate a critical freight car shortage.

STATUTE INVOLVED

Section 1(15) of the Interstate Commerce Act, 49 U.S.C. § 1(15), provides:

> Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions

with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

STATEMENT

The Nation is currently in the midst of the worst continuing boxcar shortage in its history. The problem has been particularly acute in the lumber industry,

where the general shortage has been exacerbated by the shippers' practice of using boxcars as mobile warehouses, moving their lumber to market via a process known as sales-in-transit in which boxcars are loaded with lumber and shipped to hold and reconsign points prior to being sold to the ultimate consumer. The existing tariffs permit reconsigning this transit lumber after arrival at hold points subject only to nominal reconsignment charges and demurrage for detention in excess of 24 hours after notice of arrival is given—charges which, the Commission's field reports revealed, were wholly inadequate to prevent excessive and growing delays in reconsignment.

Section 1(15) of the Interstate Commerce Act expressly authorizes the Commission "with or without notice, hearing, or the making or filing of a report" to issue car service directions "[w]henever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists." Concluding that the continuing practice of using boxcars as warehouses, coupled with the unprecedented strain put on the National boxcar fleet by the requirements of the Russian grain movement, constituted an "emergency" within the purview of the statute, the Commission issued its Service Order No. 1134, designed to alleviate the car shortage caused by excessive delay in reconsignment by limiting the hold time at reconsignment points to five days (120 hours), exclusive of Saturdays, Sundays, and holidays. If the shippers choose to hold their lumber cars at reconsignment points longer than five days, they would

be subject to local or joint tariff rates from the point of origin—to the hold point—to the ultimate destination.

On appeal, the district court held that the Commission "was without Congressional authority to issue the order under the provisions of § 1(15)" (App. A., *infra,* p. 18). Disregarding the clear and unambiguous statutory language which authorizes the Commission, without notice or hearing, to issue service orders "[w]henever [it] is of opinion that shortage of equipment * * * or other emergency requiring immediate action exists", and ignoring this Court's prior holding that the car service authority is applicable to "the use to which the vehicles of transportation are put * * *" *Peoria and Pekin Union Railway Co.* v. *United States,* 263 U.S. 528, 533, the lower court held that, because the effect of the order would be to compel shippers who choose to use the boxcars as mobile warehouses to pay a higher charge therefor, the order constituted a "rate fixing order developed through procedures lacking due process" (App. A., *infra,* p. 18).

THE QUESTION IS SUBSTANTIAL

By its action the lower court has cast grave doubt on the Commission's most effective and necessary regulatory tool for directing efficient use of the Nation's scarce boxcar resources. It is well known that despite various regulatory efforts,[1] the Nation's present box-

[1] In an effort to ameliorate the effects of the boxcar shortage the Commission has moved on a number of related fronts, establishing a new schedule of payment for the use by one railroad of another's cars—"basic per diem", *Chicago, B. & Q. R. Co.* v.

car fleet is inadequate to meet today's needs. The Commission [2] and Congress [3] have long wrestled with the problem of car supply to little avail. The shortage remains, and correspondingly, the Commission's ability to direct effective use of the Nation's limited rail resources through service orders has become a matter of major, and increasing, importance.

The car service order under review was but one of an orchestrated series of orders [4] necessitated by an

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New York S. & W. R. Co., 332 I.C.C. 176, sustained on review *sub nom. Union Pacific R. Co.* v. *United States*, 300 F. Supp. 318 (D. Neb. 1969), and *Boston & Maine Railroad* v. *United States*, 297 F. Supp. 615 (D. Mass. 1969), *aff'd per curiam* 396 U.S. 29; adding an "incentive" element to the basic per diem to encourage the prompt return of equipment found to be in short supply, see *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224, sustaining the procedures used by the Commission in promulgating the incentive per diem charges in *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 337 I.C.C. 217; and requiring that unloaded freight cars be returned with or without a load in the direction of the owning line, *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264, 335 I.C.C. 874, sustained *sub nom. United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742.

[2] See, *e.g. Car Service, Freight Cars*, 268 I.C.C. 687 (1947); *Car Supply Investigation*, 42 I.C.C. 657 (1917); *Car Shortages—Insufficient Transportation Facilities*, 12 I.C.C. 561 (1907).

[3] Congress is similarly concerned with the problems of car supply. See, e.g., S. Rep. 386, 89th Cong., 1st Sess. (1965); S. Rep. 445, 87th Cong., 1st Sess. 720 (1961); S. Rep. 452, 86th Cong., 1st Sess. (1959).

More recently the Senate passed on July 23, 1973, Senate Bill S. 1149 which is intended to "Increase the Supply to Meet the Needs of Commerce, Users, Shippers, National Defense, and the Consuming Public". S. Rep. 93-303, 93rd Cong., 1st Sess.

[4] Contrary to the arguments made by the plaintiffs below to the effect that the lumber industry was unfairly singled out to bear the brunt of corrective measures embraced in car service

unusual combination of the underlying chronic boxcar shortage, a booming economy, the financial inability of a significant segment of the rail industry to add to the boxcar fleet, and the unexpected demands made on the Nation's overall transportation resources by the Russian grain sales. Against this background, the Commission viewed the practice of using boxcars as mobile warehouses for longer and longer periods as adding to the overall rail emergency. Service Order No. 1134, while not eliminating shippers' rights to reconsignment in transit, sought to limit the hold time at reconsignment points to five working days, and thereby increase the transportation usage of the affected boxcars.

In holding that, because the order necessarily had to suspend temporarily the underlying tariffs which al-

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orders, a number of contemporaneous orders were issued affecting different segments of the economy in an attempt to meet the car shortage crisis.

For instance, the grain industry was subjected to Service Order No. 1120. There the Commission placed a restriction on the number of jumbo covered hopper cars that could be used in unit-grain-train service. This action was considered necessary to insure better distribution of cars among all grain shippers—large and small.

Similarly, by Service Order No. 1117, the Commission permitted the substitution of open-top hopper cars (normally used for coal movements) for the transportation of grain. In other words, it permitted the diversion of coal industry transportation resources to help move the Russian grain to the ports. And with the unprecedented volume of grain moving to the ports causing congestion and delays, the Commission by Service Order No. 1121 reduced the free-time period on boxcars and covered hoppers held at port from the existing five and seven-day period to three days. Other types of equipment were later added to the order.

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low the practice of indefinite holding at reconsignment points in order to accomplish its goal, the order thereby became a "rate order" rather than a "car service order", the lower court has imposed an unwarranted limitation upon the Commission's statutory authority. Section 1(15) expressly authorizes the Commission to "suspend the operation of any or all * * * practices then established with respect to car service * * *" in an emergency situation. On its face, this applies to those practices contained in a carrier's tariff, as well as any other practice. Moreover, in concluding that the Commission's order is a "rate order", the district court has wholly ignored the fact that under Service Order No. 1134, the shipper retains complete initiative and option as to what rate he will pay. As long as the shipper seeks only transportation and reasonable reconsignment services, there is no change whatsoever in the charge he must pay. Only when he seeks to use the boxcar, not for transportation but for warehousing, does the service order have any effect at all on his total bill.

This Court has emphasized that the car service authority applies to "the use to which the vehicles of transportation are put * * *" (*Peoria and Pekin Union Railway Co.* v. *United States, supra*)—precisely the point of the service order at issue. The entire purpose of the order was to discourage shippers from using the boxcars as warehouses, thereby freeing more cars for use in transporting goods. And, indeed, there certainly can be no doubt that this purpose was well within the contemplation of Section 1(15), since the

problem of mobile warehousing was one of the specific problems to which the Commission's car service authority was originally addressed.*

By holding that the temporary suspension of the underlying tariffs which embody practices in conflict with car service goals takes a Commission order outside the ambit of the car service provisions, the lower court has significantly weakened the Commission's power to direct car service in the public interest. No requirement in law compels such an illogical and technical result.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

FRITZ R. KAHN,
General Counsel,
BETTY JO CHRISTIAN,
Associate General Counsel,
CHARLES H. WHITE, JR.,
Attorney,
Interstate Commerce Commission.

* Congressman Esch, the sponsor of the legislation which ultimately became Section 1(15) of the Act—the Esch Car Service Act, 40 Stat. 101—specifically referred to the practice of shippers using freight cars as warehouses as being a main cause of car shortage to be remedied by his legislation (55 Cong. Rec. 2020–2021): "Another cause of car shortage is the holding of cars on the part of the shippers themselves, using the car as a species of warehouse, instead of promptly unloading it. I think that it is quite a universal evil throughout the United States, but it is due in some measure to the lack of warehouse and elevator facilities at the terminals."

APPENDIX A

[Endorsed: Filed Oct. 18, 1973, Robert M. Christ, Clerk, By C. Mundorff, Deputy]

United States District Court for the District of Oregon

Civil No. 73-486

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; AND AMERICAN INTERNATIONAL LUMBER CO.; PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT AND INTERSTATE COMMERCE COMMISSION, DEFENDANT-INTERVENOR

Memorandum of decision

Before: GOODWIN, Circuit Judge, and EAST and SKOPIL, District Judges [1]

STATEMENT OF THE CASE

On May 8, 1973, the intervenor Interstate Commerce Commission (Commission), basing its action on the provisions of 49 U.S.C. § 1(15), sua sponte, and without notice and hearing, issued its so-called Service

[1] Honorable Alfred T. Goodwin, United States Circuit Judge for the Ninth Circuit, Honorable William G. East, Senior United States District Judge for the District of Oregon, and Honorable Otto R. Skopil, Jr., United States District Judge for the District of Oregon, constituting a statutory three-judge district court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit, dated May 25, 1973.

Order No. 1134 (Order). The Order has been from time to time continued and is now in effect.

The plaintiffs instituted these proceedings pursuant to 28 U.S.C. §§ 2321–2325 to annul and enjoin the enforcement of the Order contending, *inter alia*, that:

While the Order purports to deal with car service, it in truth and in fact deals with transportation charges over which the Commission has no authority under § 1(15) to change in the manner attempted by the Commission; and the Order issued without notice or hearing or good cause shown, suspends regularly and duly filed tariffs of the Commission "relating to joint and through [railroad shipping] rates for lumber and plywood in violation of 49 U.S.C. § 6(3) [sic]." [49 U.S.C. § 15(1)]

JURISDICTION

We note the jurisdiction of this three-judge district court under 28 U.S.C. §§ 2321–2325.

FACTS

We find from the agreed statement of facts and the affidavits filed herein these pertinent facts: Plaintiffs are Oregon corporations all engaged in the wholesale lumber business. In their business, they cause lumber and plywood purchased and sold by them to be transported from their sources of supply to their customers throughout the United States. The rates charged by railroads for transportation of lumber and plywood affect to a large extent the rate of economic activity in the Northwest and the impact of such rates is vital to the economy of the region and the plaintiffs.

Approximately 75 per cent of all the lumber and plywood produced in the Northwestern states is sold through the wholesale arm of the lumber industry.

For almost half a century the wholesalers have used a common practice of some form of a diversion or reconsignment of their railroad car shipments while in route from point of origin to or at the original destination under pre-fixed joint or through railroad shipment rates and charges established under duly filed tariffs as regulated by the Commission under its general powers and appropriate procedure under the Interstate Railroad Transportation Act, after notice and hearing.

In recent years the practice is generally known as wholesalers' sales-in-transit. The wholesaler will ship a given carload or carloads to a given "hold point" with the view that the car or cars will be ultimately diverted or reconsigned to a more distant point of final destination. The railroad joint or through shipping rate from the point of origin to the ultimate final destination is always substantially less than the combined or aggregate of short haul rates between intermediary points. For example, the through rate for a 7500 lb. minimum carload from Pacific Coast shipping points to New York, via the intermediate points of Marshalltown, Iowa, and Chicago, Illinois, is $1432.50, while the aggregate of the three local rates between points totals $2452.00.

The Order applies only to the transportation of lumber and plywood by railroads and provides that in the event carload shipments are held at a transit point more than 120 hours, exclusive of Saturdays, Sundays and holidays, and thereafter forwarded to another destination, or delivered to a newly designated consignee, such shipment will lose the benefit of any applicable through rate from the shipping point to the ultimate designation. Such shipment would be subject to the sum of the local rates which are as pointed out above usually substantially greater in amount.

The railroads of the United States have been struggling with the problem of boxcar shortages, particularly as they affect the lumber and plywood industries, for over fifty years, and the Commission has issued hundreds of Service Orders under 49 U.S.C. § 1(15) in an attempt to alleviate the problem caused by boxcar shortages. However, the Commission has never in the past issued an order pursuant to the claimed authority of 49 U.S.C. § 1(15), which imposed the severe sanctions upon shippers as contained in the Order, or which purported to affect the rights of shippers to make use of a joint or through rate in effect pursuant to a duly filed and authorized tariff. In comparison, the imposition of tariff regulated reasonable time based demurrage charges for cars held at a given point over stated times has been a traditional sanction upon shippers to keep the cars rolling.

ISSUE

Whatever authority the Commission may have to alleviate the problem of car shortages by prescribing shipping rates and charges through appropriate procedures, with notice and hearing, is not in issue. The basic and sole issue before the court is whether the Commission had Congressional authority under the "emergency" car service section, Title 49 U.S.C. § 1 (15), to promulgate and issue the so-called "car service" Order. We hold that it did not.

DISCUSSION

The authority of the Commission over "car service items" flows from 49 U.S.C. § 1(10), which provides in essential parts, "The term 'car service' * * * shall include the use, * * * movement * * *, and return of * * * cars * * * used in the transportation of prop-

erty *by any carrier by railroad.* * * *" [Emphasis added.] So it follows that " 'car service' connotes the use to which the vehicles of transportation are put [by a carrier]; not the transportation service rendered by means of them." *Peoria & P.U. Ry. Co.* v. *United States,* 263 U.S. 528, 533 (1924).

Paragraph (14) of § 1 is the enabling section or procedural prerequisite for the issuance of the Commission's car service orders. The purpose of car service orders is best explained in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 472, 743–744 (1972), through this observation of Mr. Justice Rehnquist:

> "The country's railroads long ago abandoned the custom of shifting freight between the cars of connecting roads, and adopted the practice of shipping the same loaded car over connecting lines to its ultimate destination. The freight cars of the Nation thus became in essence a single common pool, used by all roads. This practice necessarily required some arrangements for eventual return of a freight car to the lines of the road which owned it, and in 1902 the railroads through their trade association dealt with this and related problems in a code of car service rules with which the roads agreed among themselves to comply. The effect of the Commission's order now under review is to promulgate two of these rules as the Commission's own, with the result that sanctions attach to their violation *by the railroads.* [Emphasis added.]
>
> "Because of critical freight-car shortages experienced during World War I, Congress enacted the Esch Car Service Act of 1917, which empowered the Commission to establish reasonable rules and practices with respect to car service by railroads, 40 Stat. 101, 49 U.S.C. § 1(14)

(a). The pertinent language of that Act provides:

"'The Commission may [after hearing] * * * establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter * * *.'" ["including the compensation to be paid * * * for the use of any * * * car * * * not owned by the carrier using it. * * *"]

So we emphasize that § 1(14) contemplates Commission rules and regulations, with respect to car service, applicable with sanctions, to uses of cars *by railroads* and not by shippers.

Section 1(15) gives the Commission four categories of emergency authority when it is of the opinion that shortages of equipment or other emergencies requiring immediate action exist, at once, with or without notice or hearing:

"(a) to suspend * * * rules, regulations, or practices *then existing* [emphasis added] with respect to car service * * *,

(b) to make * * * directions with respect to car service * * * during such emergency as * * * will promote * * * service * * * [and provide compensation *as between carriers*].

(c) to require * * * common use of terminals, * * * and

(d) to give directions * * * for preference or priority in transportation. * * *"

Manifestly the expressed authority to the Commission under either of categories (b), (c) or (d) does not support the Order under challenge. Nor does the expressed authority under category (a) give any validity to the Order. The Order does not purport to suspend any rule, regulation or practice then established in connection with car service. On the contrary

the Order condones the practice of sales-in-transit, which involves a form of boxcar warehousing for an indefinite time until a diversion or reconsignment occurs but requires shippers employing this practice to pay a higher ultimate shipping rate to the carriers.

Expressed authority to the Commission for fixing shipping rates and charges during a declared emergency under § 1(15) is utterly lacking and none can be rationally inferred or implied from the express language. It has been held that the "sole purpose" of categories (a) and (b) authority is "to make [railroad cars] available in emergencies to a carrier other than the owner. * * *" *Peoria & P.U. Ry. Co.* v. *United States,* supra, at 533, 534. Also, the section is no general grant of emergency power to prevent interruptions in traffic "and the detail in which the subjects of such power has been specified precludes its extensions to other subjects by implication." 263 U.S. at 535.

The intervenor urges the holding of *Turner, Dennis & Lowry Lbr. Co.* v. *Chicago, M. & St. Paul Ry. Co.,* 271 U.S. 259 at 262, as supportive of the Order. *Turner* did not involve and approve an order issued under § 1(15), but rather an order involving a "demurrage tariff duly filed." The decision is no authority for the Order challenged herein.

In summary, we point out that the sole purpose and effect of the Order is to deprive lumber and plywood shippers of the benefit of a long-standing railroad shipping practice, approved under prior lawful rate regulation procedures, and the further benefit of the pre-existing joint and through shipping rates provided therefor; and in turn to substitute for such joint and through rates a combination or aggregate of the local rates between intermediary points resulting in the im-

position of sanctions, which approach confiscatory amounts.

The Service Order label and the citation of authority therefor does not mask or legitimatize the illegal rate fixing Order developed through procedures lacking due process.

CONCLUSIONS OF LAW

We conclude that the Commission was without Congressional authority to issue the Order under the provisions of § 1(15) and acted arbitrarily and unlawfully in the formulation and issuance thereof and that the Order is void from its inception. Accordingly, the plaintiffs are entitled to an Order and Decree herein:

(a) setting aside, vacating and holding for naught the Order in its entirety as of its inception;

(b) restraining and enjoining the Commission and all persons acting on its behalf from the enforcement of the terms and sanctions imposed thereunder; and

(c) allowing plaintiffs' costs.

This Decision shall constitute the court's Findings of Fact and Conclusions of Law as provided in Rule 52(a), Federal Rules of Civil Procedure.

Dated this 18th day of October, 1973.

(S) ALFRED T. GOODWIN,
United States Circuit Judge.

(S) WILLIAM G. EAST,
United States District Judge.

(S) OTTO R. SKOPIL, JR.,
United States District Judge.

[Endorsed: Filed Oct. 18, 1973, Robert M. Christ, Clerk, By C. Mundorff, Deputy]

United States District Court for the District of Oregon

Civil No. 73-486

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO., AND AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT AND INTERSTATE COMMERCE COMMISSION, DEFENDANT-INTERVENOR

Decree

Before: GOODWIN, Circuit Judge, and EAST and SKOPIL, District Judges

Based upon the Memorandum of Decision, constituting the court's Findings of Fact and Conclusions of Law, filed herein contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) The Service Order No. 1134 entered by the Interstate Commerce Commission, Division 3, at its session on the 3rd day of May, 1973, in Washington, D.C., under the title of Part 1033-Car Service, in its entirety, is set aside, vacated and held for naught as of its entry;

(2) The Interstate Commerce Commission and all persons acting for and on its name and behalf are

permanently restrained and enjoined from the enforcement of said Order in part or its entirety; and

(3) The plaintiffs have and recover costs herein.

Dated this 18 day of October, 1973.

(S) ALFRED T. GOODWIN,
United States Circuit Judge.

(S) WILLIAM G. EAST,
United States District Judge.

(S) OTTO R. SKOPIL, JR.,
United States District Judge.

APPENDIX B

Service date: May 8, 1973.

Title 49—TRANSPORTATION

Chapter X—INTERSTATE COMMERCE COMMISSION

Subchapter A—GENERAL RULES AND REGULATIONS

Part 1033—*Car Service*

Service Order No. 1134

Lumber and Plywood—Restrictions on Reconsigning

At a Session of the Interstate Commerce Commission, Division 3, held in Washington, D.C., on the 3rd day of May 1973.

It appearing, That an acute shortage of boxcars and other freight cars suitable for transporting lumber and plywood exists throughout the country; that certain carriers are unable to furnish adequate supplies of these types of freight cars to shippers located on their lines; that these shortages of freight cars are impeding the movement of many commodities; that many freight cars are held by shippers for excessive periods awaiting loading, unloading, or disposition instructions; that carloads of lumber and plywood are being held for excessive periods awaiting instructions for diversion, reconsignment or other disposition orders; that such practices immobilize large numbers of freight cars needed by shippers for the transportation of other freight; and that the existing demurrage and detention rules, regulations, and practices of the railroads are ineffective to control such use of freight

cars. It is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§ 1033.1134 *Lumber and Plywood—Restrictions on Reconsigning*

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce, and obey the following rules, regulations, and practices with respect to its car service:

(1) *Application:* (i) The provisions of this order shall apply to intrastate, interstate, and foreign commerce. (ii) *Definition of lumber and plywood.* The term "lumber and plywood" as used in this order means lumber, veneer or forest products as listed in items 57580 to 58450 of Uniform Freight Classification No. 11, I.C.C. 7, or as listed in items 57580 to 58450 of Consolidated Freight Classification No. 23, I.C.C. No. 2, each issued by J. D. Sherson, supplements thereto, or re-issues thereof.

(2) *Holding of cars for diversion, reconsignment, or disposition orders restricted:* Carload shipments of lumber or plywood held in cars in excess of five days (120 hours), exclusive of Saturdays, Sundays, and holidays listed in Item 25 of General Car Demurrage Tariff 4–J, I.C.C. H–59, issued by B. B. Maurer, supplements thereto, or re-issues thereof, after the first seven a.m. (7:00 a.m.) after notice of arrival of the car at billed destination is sent or given and subsequently for-

warded to another destination or delivered to a newly designated consignee upon instructions of the consignee, consignor, or owner, will be subject to the full local or joint (not proportional, reshipping, or transshipping) tariff rate from origin point to hold point in effect on date of shipment plus the full local or joint (not proportional, reshipping, or transshipping) tariff rate from the reforwarding point in effect on the date reforwarding instructions are given to carrier, plus all other applicable charges previously or subsequently accruing. (See exception.)

(3) *Expection: Cars at hold points on May 15, 1973:* A notice, giving car number and hold point, shall be sent on May 15, 1973, to each shipper, consignee, or other qualified owner of each car of lumber or plywood held awaiting instructions for diversion, reconsignment, or reforwarding on that date, stating that the car will be subject to the bases of charges provided in this order unless diversion, reconsignment, or reforwarding instructions are given to the carrier within five days (120 hours) exclusive of Saturdays, Sundays, and holidays of the effective date of this order. Such notice shall be used in lieu of the arrival notice described in part (2) herein, in computing time on cars at hold points on May 15, 1973.

(b) *Rules and regulations suspended.* The operation of all rules and regulations, including rates, rules, and free-time periods granted by authority of Part 1, Section 22 of the Interstate Commerce Act, insofar as they conflict with the provisions of this order, is hereby suspended.

(c) *Effective date.* This order shall become effective at 11:59 p.m., May 15, 1973.

(d) *Expiration date.* This order shall expire at 11:59 p.m. July 31, 1973, unless otherwise modified, changed, or suspended by order of this Commission.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies Secs. 1(10–17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10–17), 15(4), and 17(2).)

It is further ordered, That a copy of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association; and that notice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Division 3.

[SEAL] ROBERT L. OSWALD,
Secretary.

APPENDIX C

[Endorsed: Filed Dec. 17, 1973, Robert M. Christ, Clerk, By J. Shelton, Deputy]

In the United States District Court for the District of Oregon

Civil Action No. 73–386

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLAND LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; AND AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Notice of Appeal

1. Notice is hereby given that the Interstate Commerce Commission, one of the defendants in the above-entitled action, hereby appeals to the Supreme Court of the United States from the opinion and order of this Court dated October 18, 1973. This appeal is taken pursuant to 28 U.S.C. § 1253.

2. The entire record in this action is hereby designated for certification by the Clerk of the District Court to the Clerk of the Supreme Court. The Clerk

of the District Court is requested to prepare and to transmit the entire record to the Clerk of the Supreme Court.

This 14th day of December, 1973.

Charles H. White, Jr.,
CHARLES H. WHITE, Jr.,
Attorney,
Interstate Comerce Commission,
Washington, D.C. 20423.

Fritz R. Kahn/Cw.
FRITZ R. KAHN,
General Counsel.

CERTIFICATE OF SERVICE

I hereby certify that on this, the 14th day of December, 1973, I served copies of the foregoing Notice of Appeal on counsel for all parties of record by first-class, air-mail, postage prepaid.

Charles H. White, Jr.
CHARLES H. WHITE, Jr.,
Attorney.

U.S. GOVERNMENT PRINTING OFFICE: 1974

MOTION FILED

FEB 14 1974

73-1210

In the

Supreme Court of the United States

October Term, 1973

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLAND LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees.

On Appeal from the United States District Court for the District of Oregon

MOTION OF WESTERN RAILROAD TRAFFIC ASSOCIATION FOR LEAVE TO APPEAR AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

February 11, 1974

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DAILY JOURNAL OF COMMERCE

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UNITED STATES STATUTE

In the Supreme Court of the United States

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INTERSTATE COMMERCE COMMISSION,
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OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLAND LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO.,
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On Appeal from the United States District Court for the District of Oregon

MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

The following western railroads:

The Atchison, Topeka and Santa Fe Railway Company
Burlington Northern
Chicago & Eastern Illinois Railroad
Chicago & North Western Transportation Company
Chicago, Milwaukee, St. Paul and Pacific R.R.
Chicago, Rock Island and Pacific Railroad Company
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Green Bay and Western Railroad Company
Illinois Central Gulf Railroad
Illinois Terminal Railroad Co.
The Kansas City Southern Railway Co.
Missouri-Kansas-Texas Railroad Co.
Missouri-Pacific Railroad Co.
Norfolk and Western Railway Co.
St. Louis-San Francisco Railway Co.

St. Louis Southwestern Railway Company
Soo Line Railroad
Southern Pacific Transportation Company
The Texas & Pacific Railway Company
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad
The Western Pacific Railroad Company
The American Short Line Railroad Association

comprising the Western Railroad Traffic Association, respectfully move for leave to appear as *amicus curiae* and to file the attached brief supporting the jurisdictional statement of the Interstate Commerce Commission. The Commission has granted its consent, but appellees refuse to do so.

Railroad members of Western Railroad Traffic Association carry most of the lumber and wood products which are shipped annually from western mills to consumers in other parts of the country, and they are substantially and adversely affected by the existing severe shortage of boxcars and other freightcars suitable for such traffic. Consequently, they are interested in and concerned by the District Court's decision setting aside an emergency car service order under § 1(15) of the Interstate Commerce Act which would eliminate the practice of shippers to immobilize freightcars by using them as traveling warehouses.

In *Atchison, T. & S.F.R. Co. v. Bd. of Trade* (1973) ____ US ____, 37 L ed 2d 350, this Court noted that

wasteful shipping practices are a significant cause of freightcar shortages, and the record shows that a severe shortage exists in the lumber industry which is substantially contributed to by shipper practices which are the subject of the Commission's order. However, the District Court set it aside on the ground that it was a "rate fixing order," not a "car service order," and was not authorized by § 1(15). The result is to nullify an important action of the Commission, one taken in the public interest to alleviate an increasingly critical shortage of cars. The impact of the Court's decision on the Western Lines is substantial and adverse.

In the attached brief *amicus curiae*, these railroads, through their association, urge the Court to note probable jurisdiction and set the case for oral argument.

Respectfully submitted,

OGLESBY H. YOUNG
Counsel for Western Railroad Traffic Association, *Amicus Curiae*

February 11, 1974

James H. Clarke
Mark S. Dodson
Of Counsel

In the Supreme Court of the United States

October Term, 1973

INTERSTATE COMMERCE COMMISSION,
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v.
OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLAND LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees.

On Appeal from the United States District Court
for the District of Oregon

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

Railroads who are members of Western Railroad Traffic Association are interested in the District Court's decision, because it will prolong a freightcar shortage which adversely affects them by limiting the Commission's power to deal with such conditions under § 1(15) of the Interstate Commerce Act, 49 USC § 1(15), and because it deprives the Commission of authority under § 1(15) to increase car utilization in an emergency by regulatory measures which temporarily affect railroad rate charges.

ARGUMENT

The District Court incorrectly limited the commission's emergency power to increase car utilization under § 1(15) of the Interstate Commerce Act by drawing an unsound and unwarranted distinction between "rate orders" and "car service orders."

The District Court did not question the reality or severity of the current freightcar shortage. However, the court construed § 1(15) to deny the Commission power to take necessary steps to increase car utilization, holding that it cannot issue emergency car service orders which have the effect of temporarily suspending tariff provisions. The court's decision severely limits the Commission's ability to deal with boxcar shortages amounting to emergencies, and it is urgent that this Court should review it.

Until now, emergency car service orders have frequently contained provisions designed to increase car utilization by increasing transportation charges.[1/] However, the order which the District Court set aside in this

1/ E.g., the Commission has increased demurrage charges, which by reason of their regulatory function are among the "rules, regulations and practices" which are subject to § 1(15). See *Armour & Co. v. Louisiana S. Ry. Co.*, (CA 5 1951) 190 F2d 925 at 927, cert den (1952) 342 US 913. Such a demurrage order has all of the characteristics of a rate order which

case does not change any tariff rate; instead it seeks to increase car utilization by declaring when an existing rate shall apply. Whether or not this is among the "rules, regulations and practices" referred to in § 1(15) is a substantial question which cannot be determined by a semantic distinction between "rate orders" and "car service orders."2/

The important question in this case is not whether the Commission has authority to regulate rates, but whether under § 1(15) it can issue an emergency order affecting rates without notice or hearing. That question has never been considered by the Court, although recent decisions forcefully suggest that it was wrongly decided by the court below.

In *United States v. Allegheny-Ludlum Steel Corp.*, (1972) 406 US 742 the Court held that § 1(14)(a) of the Act does not require an "adjudicatory" hearing, and in a concurring opinion in *Atchison, T. & S.F.R . v. Bd.*

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are referred to by the District Court: It suspends tariff provisions, it penalizes the shipper, and it establishes a fixed time limit beyond which charges become regulatory rather than compensatory.

2/ In *Iverson v. United States*, (D DC 1946) 63 F Supp 1000 at 1006, aff'd (1946) 327 US 767 Judge Prettyman concluded that regulatory orders affecting charges are still "rules" under § 1(15): "* * * If a published rule or regulation affects or determines a charge, it is nevertheless a rule or regulation."

of Trade, (1973) ____ US ____, 37 L Ed 2d 350 at 374, three members of the Court approved on attempt by the Commission to increase the efficient utilization of freightcars by increasing accessorial charges as a "promising effort to solve a critical problem."3/

In sharp contrast to this increasing emphasis on the regulatory function of rate charges and the reduced scope of adjudicatory hearings, the court below nullified a regulatory order which affected rates in dealing with an emergency under § 1(15), even though that section expressly authorizes the Commission to proceed in such cases without notice or hearing. It did not inquire if this was a proper regulation to meet an emergency, or if, instead, it was a disguised attempt to fix compensation without an ajudicatory hearing; it simply ignored the distinction between the two. The issue before this Court is whether that question is controlled by abstract concepts of "car service orders" and "rate orders," or whether the Commission has authority in an emergency to improve car service by reasonable regulations which it deems appropriate to the situation. This is a substan-

3/ In *United States v. Florida East Coast R. Co.*, (1973) 410 US 224 at 232 the Court noted increasing congressional and judicial criticism of the Commission for "conducting too many hearings and taking too little action." In *Peoria Ry. Co. v. United States*, (1923) 263 US 528 at 533-34, n.7 the Court reviewed the legislative history of the Esch Car Service Act. It is clear from that discussion that Congress did not intend to disable the Commission from dealing effectively with boxcar emergencies by requiring extensive judicial procedures.

tial question, one badly confused by the decision below, which this Court should answer.[4/]

CONCLUSION

This is an important case in which the District Court severely limited the Commission's authority to issue emergency car service orders under § 1(15) of the Act, and its decision will prolong and intensify the current boxcar shortage. The Court should note probable jurisdiction and set the case for oral argument.

Respectfully submitted,

OGLESBY H. YOUNG
Counsel for Western Railroad Traffic Association, *Amicus Curiae*

February 11, 1974

James H. Clarke
Mark S. Dodson
Of Counsel

4/ In substance, the decision below is also inconsistent with decisions of other courts, which have allowed the Commission reasonable scope to interpret its emergency powers *(United States v. Southern Railway*, (ED Va 1969) 306 F Supp 108 at 112) and recognize that due process does not require an adjudicatory hearing in a broad rate making context *(Virgin Islands Hotel Ass'n. v. Virgin Islands W. & P. Auth.*, (CA 3 1973) 476 F 2d 1263).

No. 73-1210

In the Supreme Court of the United States

OCTOBER TERM, 1973

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

OREGON PACIFIC INDUSTRIES, INC., ARTHUR A. POZZI CO., TIMBERLAND LUMBER CO., CHAPMAN LUMBER CO., NORTH PACIFIC LUMBER CO., and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees.

MOTIONS TO AFFIRM AND ARGUMENT

On Appeal from the United States District Court for the District of Oregon

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No. 73-1210

In the Supreme Court of the United States

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INTERSTATE COMMERCE COMMISSION,
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OREGON PACIFIC INDUSTRIES, INC., ARTHUR A. POZZI CO., TIMBERLAND LUMBER CO., CHAPMAN LUMBER CO., NORTH PACIFIC LUMBER CO., and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees.

MOTIONS TO AFFIRM AND ARGUMENT

On Appeal from the United States District Court for the District of Oregon

Come now the appellees in the above entitled action and move this Court for an Order affirming the Judgment of the court below pursuant to Rule 16(c) and Rule 16(d) of the Rules of this Court on the following grounds:

MOTION I

There is no substantial reason why this Court should hear arguments on the merits.

ARGUMENT

The issue in this case is not whether the appellant has the power under *appropriate procedures* to issue an order or an amendment to the appropriate tariff having the effect of Service Order 1134 (Appendix B - Page 21 - Jurisdictional Statement).

The issue is whether the extraordinary power granted to the appellant in 49 U.S.C. 1(15) can be used to provide the remedies the appellant seeks to invoke under Order 1134 without any notice, hearing or opportunity by the appellees or persons in their business to give the Interstate Commerce Commission the benefit of their knowledge of the lumber business and the problems involved. The opinion of the court below which analyzes the legislative history of the statute in question as well as the administrative practices of the appellant over the past 56 years that the statute has been in existence demonstrates clearly that the appellant does not have the power it claims under 49 U.S.C. 1(15). It is also apparent that the appellant never previously believed that it had the power it attempted to invoke in this case.

The appellant admits that the boxcar shortage has existed for more than fifty years and the undisputed evidence is that the marketing practices of the appellees have existed for more than 33 years (See Affi-

davit of A. M. Cheatham - p. 4, ll. 12-32). Although the appellant has admitted that it has issued hundreds of car service orders for the purpose of dealing with the boxcar shortage, it never purported to exercise the power it arrogates to itself under car service order 1134 (Paragraphs 6, 7, pp. 7-8, Stipulation of Facts).

In view of the legislative history of the statute in question, the undisputed testimony of the appellees and the admissions of the appellant it would appear that the present contentions of the appellant are unsubstantial as being contradicted by the legislative history of 49 U.S.C. 1(15) and its administrative history as construed by the appellant and this Court should affirm the Judgment on the basis of the opinion of the court below.

MOTION II

49 U.S.C. 1(15) under which the appellant purported to act in this case applies only to "emergencies." The facts in the record demonstrate clearly that there was no emergency as contemplated by the statute.

ARGUMENT

The appellant claims that Service Order 1134 is a car service order which it had authority to issue under 49 U.S.C. 1(15). The court below held that it was not. The court held it was in effect an amendment to the tariff, passing as a car service order and the label given the action of the appellant was a mask to attempt to legitimatize an action designed to by-pass

normal due process procedures. The appellees urge that this is the correct view of the situation. Even if it is not, the appellees contend the appellant exceeded its powers and the order should be set aside for that reason.

The entire statutory scheme of the Interstate Commerce Act and its statutory history makes it clear that "non-emergency" problems can only be dealt with by the appellant after appropriate hearings, notice, opportunity to be heard, judicial review and all of the other safeguards which normal administrative procedures have given affected parties.

There are two sections of the Interstate Commerce Act authorizing the appellant to issue car service orders. 49 U.S.C. 1(14) provides for all of the above normal administrative procedures, which admittedly were not used in this case. 49 U.S.C. 1(15), under which the appellant purported to act in this case, eliminates such safeguards in "emergency" cases because of what was felt to be the overriding public necessity in such cases. (See House Report 18, 65th Congress, First Session) Therefore, the threshold question to be decided in this case is whether the appellant properly acted under the "emergency" section of the Interstate Commerce Act (49 U.S.C. 1(15)). Obviously merely calling a situation an emergency does not make it so. The use of the word "emergency" is subject to the same abuses as the invocation of other similar catch phrases and this Court must have the ultimate right to determine whether the jurisdictional

facts as shown in the record are present which would authorize the appellant to exercise its "emergency" powers.

The admission of facts in the record of this case (pp. 6-7, Stipulation of Facts) and the undisputed evidence (Affidavit of A. M. Cheatham - p. 4, ll. 12-32) shows that the condition the appellant is attempting to deal with has existed for over fifty years and the industry practices have been in existence for over 33 years. It would appear that a condition which has existed for over fifty years, which has been the subject of hundreds of actions by the appellant, can hardly be called an emergency which justifies ad hoc, ex parte, helter-skelter actions attempting to deal with the problems. If the actions of the lumber industry have had a material effect on the boxcar shortage, the time is long past when the appellant should have invoked the provisions of 49 U.S.C. 1(14) and have dealt with the subject on a long range basis, taking into account the interests of all of the parties involved by having appropriate hearings and giving all parties an opportunity to be heard. At the same time the Interstate Commerce Commission would benefit from the knowledge of witnesses concerning industry practices and economics which even the Interstate Commerce Commission, in its infinite wisdom, might not have available to it. This is what Congress intended when it passed the two sections in question.

This Court has never passed upon the question of whether the mere opinion of the Interstate Commerce

Commission that an "emergency" exists justifying the use of 49 U.S.C. 1(15) precludes any judicial examination of the jurisdictional facts upon which the Interstate Commerce Commission purports to act. It is true that a District Court in *Daugherty Lumber Co.* v. *U. S.*, 141 F. Supp. 576 seems to preclude such a threshold examination except when there is proof of "fraud, wrongdoing or capriciousness", and the language of the Court in *U. S.* v. *Southern Railway Company*, 364 F.2d 86 appears to follow this reasoning. It is submitted by the appellees, however, that such a standard is much too restrictive to determine whether an administrative agency has authority to decide its own jurisdiction in the first place.

The opinion of District Court Judge Hemphill, in *U. S.* v. *Southern Railway Company*, 250 F. Supp. 759, particularly at pp. 762-765, would appear to be a much more accurate statement of the law and be more in keeping with our traditions of judicial review and the limitation of administrative power. The scholarly analysis by Judge Hemphill of 49 U.S.C. 1(15) in the *Southern Railway* case, supra, should be so convincing to this Court that it should hold that the usual rules of "jurisdictional facts" should apply with respect to 49 U.S.C. 1(15). To paraphrase Judge Hemphill, 250 F. Supp. 764:

> "The net effect of what happened is that the Commission is attempting to treat a continuous chronic problem which has existed . . . 'for over 50 years' . . . as an emergency requiring immediate action."

Referring to the emergency powers granted to the Commission by 49 U.S.C. 1(15), Judge Hemphill further stated, *U. S.* v. *Southern Railway Company*, supra, 250 F. Supp. 759 at 764:

> "Nowhere in the voluminous legislative history is there any suggestion that this authority could be exercised in lieu of the regular rulemaking authority given by Section 1(14)."

To paraphrase Judge Hemphill again, 250 F. Supp. 764:

> "It is obvious that Service Order No. . . . 1134 . . . as amended, sought to deal with a chronic problem, not an emergency."

The decision of the U. S. Court of Appeals, Fourth Circuit, in *U. S.* v. *Southern Railway Company*, 380 F.2d 49, reversing Judge Hemphill does not impair the authority of his statements relating to the subject matter discussed herein because the case was decided in the Court of Appeals on an entirely different ground not relevant to this case.

At any time during the last 33 years when the practices of the appellees have been admittedly in existence, the appellant could have undertaken to follow the procedures authorized in 49 U.S.C. 1(14). It could have conducted an inquiry and commenced a proceeding for the purpose of preventing what it claims to be the harmful practices employed by the appellees and persons in similar business.

Of course, if the appellant did so, it would be required to hear testimony, make findings and be sub-

ject to judicial review. This is one thing the appellant has at all costs attempted to avoid by invoking the magic word "emergency", and issuing ex parte orders subject to no review and without the benefit of any input from the industries involved. This is what this case is all about!

CONCLUSION

This Court should not countenance such procedures any longer. It should affirm the judgment of the court below, both on the basis of the opinion of the court below and on the ground that the appellant, on the face of the record, has exceeded the powers granted to it under 49 U.S.C. 1(15) because there is no showing of an emergency in any rational sense of the word.

Respectfully submitted,

SEYMOUR L. COBLENS
Attorney for Appellees

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1210

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

OREGON PACIFIC INDUSTRIES, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16(1) of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the judgment of the district court be affirmed.

1. This is a direct appeal from the final judgment of a three-judge district court (J.S. App. 19–20) setting aside a "car service" order of the Interstate Commerce Commission (J.S. App. 21–24) issued without notice or hearing, pursuant to Section 1(15) of the Interstate Commerce Act, as amended, 49 U.S.C. 1(15). The Commission's order provides that carload shipments of lumber and plywood that are held at a reconsignment point for more than five days because

of the shipper's failure to give instructions as to the final destination of the shipment are not entitled to the joint or through rate but are subject to the sum of the local rates.

A large proportion of lumber and plywood products produced in the northwestern United States is marketed through wholesalers who utilize a practice known as "sales-in-transit." This method permits the wholesaler to ship carloads of lumber and plywood to a reconsignment or "hold" point, where the shipment is held until the shipper concludes a sale and notifies the railroad of the shipment's final destination. Under rail tariffs duly filed with the Commission, these shipments move on a joint or through shipping rate from the point of origin to the ultimate destination. A joint shipping rate is always substantially lower than the combined or aggregate of shorthaul rates between intermediary points (see J.S. App. 13). When the shipper is notified that the cargo has arrived at the hold point, he must advise the railroad of the shipment's final destination within 24 hours. If he fails to do so, the shipment is subject to demurrage charges.

The Commission's order in this case was based on its view that the existing demurrage charges and other detention rules were inadequate to deter the undue detention of railroad cars in a time of severe car shortage. But, rather than limiting the permissible period of detention or otherwise directly regulating the railroad's disposition of cars used to transport lumber and plywood, the Commission undertook to change the rate structure that makes it economically

feasible for shippers to follow the practice of sales-in-transit. It ordered that any shipment detained at a hold point for more than five days must be charged local rather than through rates.

The Commission acted summarily, without notice or hearing, invoking its emergency authority under Section 1(15) of the Act, 49 U.S.C. 1(15), to enter summary orders with respect to "car service" when "immediate action" is required. The district court held, however, that the order is not a "car service" order within the meaning of Section 1(15) but rather a rate order within the scope of Section 15, 49 U.S.C. 15, which requires a prior opportunity for a "full hearing." The court stated that the order "does not purport to suspend any rule, regulation or practice * * * in connection with car service" (J.S. App. 16); rather, it "requires shippers employing this practice [of unduly detaining cars at hold points] to pay a higher ultimate shipping rate to the carriers" (*id.* at 17). The court held that the Commission has no authority under Section 1(15) to issue a rate order without notice and hearing.[1]

2. Although the United States supported the Commission in the district court, we have reconsidered our position in the light of the court's decision. We conclude that the decision is correct and that it presents no substantial question warranting plenary consideration by this Court.

---

[1] The court left open the question of what "authority the Commission may have to alleviate the problem of car shortages by prescribing shipping rates and charges through appropriate procedures, with notice and hearing" (J.S. App. 14).

The Commission contends that its emergency "car service" authority under Section 1(15) of the Act empowers it to change applicable rates and charges in response to an emergency car shortage. But that Section provides only that, in a transportation "emergency requiring immediate action," the Commission may, without notice or hearing, "suspend the operation of any or all rules, regulations, or practices then established *with respect to car service*" and "make * * * just and reasonable directions *with respect to car service* without regard to the ownership as between carriers of locomotives, cars, and other vehicles" (emphasis added). The Commission's authority to prescribe just and reasonable rates, on the other hand, is conferred by Section 15 of the Act, 49 U.S.C. 15, which requires an opportunity for a "full hearing."

The district court correctly concluded that Section 1(15) is not an exception to Section 15's hearing requirement. "Expressed authority to the Commission for fixing shipping rates and charges during a declared emergency under § 1(15) is utterly lacking and none can be rationally inferred or implied from the express language" (J.S. App. 17).

It is no answer to say that "the shipper retains complete initiative and option as to what rate he will pay" (J.S. 8). As the Commission itself acknowledges, "the order necessarily had to suspend temporarily the underlying tariffs" (J.S. 7). The district court correctly held that an order suspending tariffs is a rate order that can only be issued under Section 15. That the order provides a means of avoiding the increased rate does not change its character as a rate order.

Nor does the district court's decision "significantly weaken * * * the Commission's power to direct car service in the public interest" (J.S. 9). The Commission has emergency authority under Section 1(15) to suspend any practice with respect to car service, and we assume that the statute would permit it to preclude or closely regulate the practice of sales-in-transit. It also has authority to enter a rate order like the one in this case, if, after a hearing, it concludes that its objective can best be accomplished through rate inducements.

It is therefore respectfully submitted that the judgment of the district court should be affirmed.

ROBERT H. BORK,
Solicitor General.
THOMAS E. KAUPER,
Assistant Attorney General.
ARNOLD P. LAV,
Attorney.

APRIL 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

MAY 13 1974

73-1210

In the

Supreme Court of the United States

October Term, 1973

INTERSTATE COMMERCE COMMISSION,
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Appellees.

On Appeal from the United States District Court for the District of Oregon

MOTION OF WESTERN RAILROAD TRAFFIC ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

May 10, 1974

JAMES H. CLARKE
800 Pacific Building
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Portland, Oregon 97204
Counsel for Western Railroad Traffic Association, *amicus curiae*

In the Supreme Court of the United States

October Term, 1973

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLAND LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees.

On Appeal from the United States District Court for the District of Oregon

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42(3) of the rules of the Court, the following western railroads comprising the Western Railroad Traffic Association:

The Atchison, Topeka and Santa Fe Railway Company
Burlington Northern
Chicago & Eastern Illinois Railroad
Chicago & North Western Transportation Company
Chicago, Milwaukee, St. Paul and Pacific R.R.
Chicago, Rock Island and Pacific Railroad Company
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Green Bay and Western Railroad Company
Illinois Central Gulf Railroad
Illinois Terminal Railroad Co.
The Kansas City Southern Railway Co.

Missouri-Kansas-Texas Railroad Co.
Missouri-Pacific Railroad Co.
Norfolk and Western Railway Co.
St. Louis-San Francisco Railway Co.
St. Louis Southwestern Railway Company
Soo Line Railroad
Southern Pacific Transportation Company
The Texas & Pacific Railway Company
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad
The Western Pacific Railroad Company
The American Short Line Railroad Association

respectfully move for leave to appear as *amicus curiae* and to file a brief urging reversal. The Commission has granted its consent, but appellees refuse to do so. On April 29, 1974 *amicus curiae* was permitted to file a brief urging the Court to note probable jurisdiction.

1. Railroad members of Western Railroad Traffic Association carry most of the lumber and wood products which are shipped annually from western mills to consumers in other parts of the country, and they depend upon the efficient utilization of boxcars and other freight cars suitable for such traffic.

The record shows that a severe shortage of freight cars exists in the wood products industry, which is substantially contributed to by shippers who immobilize freight cars by using them as warehouses at hold points. The Commission's emergency car service order under § 1(15) of the Interstate Commerce Act (49

USC § 1(15) reduced such practices, and the western lines are severely and adversely affected by the District Court's decision setting it aside.

2. The question in this case is whether Section 1(15) authorizes the Commission to remedy a critical freight car shortage by temporarily suspending a practice of carriers that allows shippers to use freight cars as warehouses at hold points under through rates. The District Court held that it does not, because such an order is not a "car service order" under the Esch Car Service Act, but is a "rate order" which affects published tariffs and charges paid by shippers. If the District Court's decision is correct, relief from the emergency, if any is available under present law, must follow extensive rate-making proceedings under Section 15 of the Act (49 USC § 15), which will leave the emergency unresolved for an indefinite period and cause substantial injury to the public and to the western lines.

While the Commission seeks to sustain its order, it does not represent railroad members of Western Railroad Traffic Association which are directly affected by it and by the District Court's decree and have an important economic interest in an adequate supply of freight cars. Furthermore, the sufficiency of the Commission's rate-making procedures as applied to such cases is involved, and the views of those who are sub-

ject to them should be heard as well as the views of the agency itself.

For the foregoing reasons, *amicus curiae* asks leave to file a brief seeking reversal of the decree of the District Court.

Respectfully submitted,

JAMES H. CLARKE,

Counsel for Western Railroad Traffic Association, *amicus curiae*

May 10, 1974

Oglesby H. Young
Mark S. Dodson
Of Counsel

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No. 73-1210

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (App. 63–69) is reported at 365 F. Supp. 609. The Interstate Commerce Commission's Service Order No. 1134 (App. 15–18) is unreported.

JURISDICTION

The opinion and judgment of the three-judge district court was entered on October 18, 1973. A Notice of Appeal was filed by the Interstate Commerce Commission on December 14, 1973 (App. 72–73). The appeal was docketed on February 7, 1974. Probable jurisdiction was noted by the Court on April 29, 1974.

The jurisdiction of this Court rests on 28 U.S.C. 1253. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 442.

QUESTION PRESENTED

Whether the lower court erred in holding that the circumstance that certain carrier practices directly affecting car utilization are embodied in their tariffs and affect the charges paid by shippers, thereby deprives the Interstate Commerce Commission of the power to issue a car service order under Section 1(15) of the Interstate Commerce Act, temporarily suspending that practice, as an emergency measure to alleviate a critical freight car shortage.

STATUTE INVOLVED

Section 1(15) of the Interstate Commerce Act, 49 U.S.C. § 1(15), provides:

> Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service

without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (App. 70–71) vacating and setting aside a car service order issued by the Inter-

state Commerce Commission pursuant to its emergency powers under Section 1(15) of the Interstate Commerce Act.

A significant percentage of lumber is moved to market by a process known as wholesalers' sales-in-transit. The shippers' loaded boxcars are sent to hold points, there to await reconsignment orders upon final sale to the wholesalers' customers. The tariffs allow indefinite holding, subject to demurrage charges for detention in excess of 24 hours. The demurrage charges, however, have never resulted in discouraging shippers from lengthy holding of cars, and in 1973 during a period of transportation emergency caused in large measure by the unexpected requirements of the Russian grain movement, field reports of the Commission staff disclosed excessive and growing delays in reconsignment at the various hold points.

To alleviate the degree of car shortage caused by excessive delay in reconsignment, the Commission isued Service Order No. 1134, *Lumber and Plywood—Restrictions on Reconsigning.* (App. 15). The service order limited the hold time at reconsignment points to five days (120 hours), exclusive of Saturdays, Sundays, and holidays. If the lumber cars are held at reconsignment points longer than five working days, the reconsignment privilege would no longer obtain and the shippers would be subject to local or joint tariff rates from the point of origin to the hold point, and from the hold point to the ultimate destination.

In setting aside the order, the district court held the Commission to be without Congressional authority to enter such an order under Section 1(15). (App. 69).

A. BACKGROUND

As this Court is well aware, the Nation presently faces a chronic shortage of railroad boxcars, *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224, 230. Despite various regulatory efforts,[1] the Nation's present freight car fleet is inadequate to meet today's needs. The Commission[2] and Congress[3] have long

[1] In an effort to ameliorate the effects of the boxcar shortage the Commission has moved on a number of related fronts, establishing a new schedule of payment for the use by one railroad of another's cars—"basic per diem", *Chicago, B. & O. R. Co.* v. *New York S. & W. R. Co.*, 332 I.C.C. 176, sustained on review *sub nom. Union Pacific R. Co.* v. *United States*, 300 F. Supp. 313 (D. Neb. 1969), and *Boston & Maine Railroad* v. *United States*, 297 F. Supp. 615 (D. Mass. 1969), *aff'd per curiam* 396 U.S. 29; adding an "incentive" element to the basic per diem to encourage the prompt return of equipment found to be in short supply, *Incentive Per Diem Changes*—1968, 337 I.C.C. 183 and 217, *sustained sub nom United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224, and *Florida East Coast Ry. Co.* v. *United States*, 368 F. Supp. 1000, aff'd, —— U.S. ——, and requiring that unloaded freight cars be returned with or without a load in the direction of the owning line, *Investigation of Adequacy of Freight Car Ownership*, 355 I.C.C. 264, 335 I.C.C. 874, sustained sub nom. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742.

[2] See, e.g. *Car Service, Freight Cars*, 268 I.C.C. 687 (1947); *Car Supply Investigation*, 42 I.C.C. 657 (1917); *Car Shortages—Insufficient Transportation Facilities*, 12 I.C.C. 561 (1907).

[3] Congress is similarly concerned with the problems of car supply. See, e.g., S. Rep. 386, 89th Cong., 1st Sess. (1965); S. Rep. 445, 87th Cong., 1st Sess. 720 (1961); S. Rep. 452, 86th Cong., 1st Sess. (1959).

More recently the Senate passed on July 23, 1973, Senate Bill

wrestled with the problem of car supply to little avail. The shortage remains, and correspondingly, the Commission's ability to direct effective use of the Nation's limited rail resources through service orders has become a matter of major, and increasing, importance.

The present case arises out of an emergency situation over and above the chronic freight car shortage. In early 1973 a combination of forces created a transportation emergency calling for immediate Commission action. Thus, a booming economy, the financial inability of a significant segment of the rail industry to add to the boxcar fleet, and the completely unexpected demands made on the Nation's overall transportation resources by the Russian grain sales, combined to place an unsustainable strain on the Nation's freight car fleet. In this crisis situation, the Commission, in addition to the general measures described *supra* at fn. 1, designed to ameliorate the chronic freight car shortage, also moved against specific practices of various industries which were exacerbating the problem. Thus, to ensure that small as well as large grain shippers would have access to the most efficient jumbo covered hopper cars, the Commission in Service Order No. 1120 placed a restriction on the number of such cars that could be used in unit-train service on grain. To

S. 1149 which is intended to "increase the Supply to Meet the Needs of Commerce, Users, Shippers, National Defense. and the Consuming Public". S. Rep. 93-303, 93rd Cong., 1st Sess.

S. 1149 was later incorporated in S. 2767, the Senate's version of the Regional Rail Reorganization Bill. Upon conference, however, the provisions of S. 1149 were deleted and the problems of boxcar supply were made a priority order of business for the 93rd Cong. 2d. Sess.

alleviate the congestion and delays at ports resulting from the arrival of the unprecedented volume of grain, the agency in Service Order No. 1121 reduced the free-time period on boxcars and covered hoppers held at port from the existing five-and-seven-day period to three days. And, to provide additional equipment for the Russian grain movement, the Commission by Service Order No. 1117 permitted the diversion of open-top hopper cars away from the coal movement for which they are normally used to the grain trade. (App. 53–55)

It was against this background that the Commission viewed the practice of using boxcars as mobile lumber warehouses for longer and longer periods as adding to the overall rail emergency. It was also against this background that the Commission was compelled, once again, temporarily to suspend the impediment to the most efficient use of the scarce boxcar fleet during a transportation emergency caused by a misuse of reconsignment by lumber wholesaler/shippers.

Reconsignment privileges, as involved in this case, differ markedly from so-called transit privileges which this Court recently considered in *Atchison, T. & S.F.R. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800. Transit privileges generally allow the stopping of a shipment en route to enable some process or operation to be performed on the goods, and the reshipping to final destination at the through rate applicable from the original shipping point to destination. Reconsignment, on the other hand, allows stopping in, or interruption of the through movement merely to change the destination or billing of a shipment en route, and no operation is

performed on the goods. Under the applicable car service rules, indefinite or open-ended holding is permitted at reconsignment points. Other than shippers of perishable commodities seeking a market, reconsignment is principally used by lumber wholesalers or brokers who set their lumber in motion before they have a purchaser. See Locklin, *Economics of Transportation* (7th Ed. 1972) pp. 602–03; see also App. 60.

Reconsignment privileges have been available since the earliest days of railroad regulation, *Reconsignment Case,* 47 I.C.C. 590 (1917), and lumber wholesalers, such as appellees, have long used boxcar storage pending reconsignment as a marketing substitute for the warehousing or storage function normally performed by wholesalers. *Edward Hines Trustees* v. *United States,* 263 U.S. 143, 146.

The Commission outlined the whole process of lumber marketing in *American Wholesale Lumber Asso.* v. *Director General,* 66 I.C.C. 393 (1922). There are two kinds of lumber mills. The large mills operate large tracts of lumber over a period of years, have large storage yards, and often their own sales force. Small mills, on the other hand, are "portable," lack storage facilities, and use the wholesalers to market their lumber.

Under the sales-in-transit technique the smaller mills, through the wholesalers, directly load the lumber cars and send them toward reconsignment points, there to await sale to a purchaser. The lumber wholesalers' storage function is thereby bypassed, and the boxcars serve as lumber warehouses. As the Commission pointed out in *American Wholesale Lumber Asso.,*

supra, this technique inevitably results in detention of some cars (*Id.* at 407):

> It may properly be pointed out that the placing of shipments in transit with the intention of selling them while they are on the rails of the carriers inevitably results in detention to some cars. The small mill is constantly tempted to put cars on the rails to secure an advance from the wholesaler, even though trade conditions are such that there is no possibility of disposing of the lumber within a reasonable time after the cars reach the hold point. When the shipment reaches the hold point and the market is rising, the wholesaler has an incentive to hold the shipment awaiting further advance in price. On a falling market the consumer defers purchase.

The practice of mobile warehousing is, in any circumstance, wasteful of transportation resources. During normal times, it has traditionally been tolerated, simply as an accommodation to the companies accustomed to handling their business in this fashion. But in times of severe transportation emergency, the habits of one industry cannot be permitted to override the critical needs of all other shippers, and the Commission has never hesitated to issue service orders, such as the one at bar, when emergency conditions required it. Thus, for example, during the post World War II period the Commission found it necessary to direct an order identical to the one at bar, against the lumber industry, limiting reconsignment on lumber and plywood shipments to 48 hours, with the sum of the local rates to apply if the cars were held for a longer period. Service Order No. 692 (1947), 12 F.R. 1685.

Later, during the Korean War, the Commission issued another car service order in the same form, limiting hold time to three working days, and subjecting the lumber shippers to the sum of the local rates if the cars are held for a longer period. Service Order No. 858, 15 F.R. 5050.[4]

Similarly, during the post World War II adjustment period, it issued a service order which, among other things, limited reconsignment on shipments of perishables to two days, with the sum of the local rates to apply if the cars were held for a longer period. Service Order No. 396, sustained *sub nom. Iversen* v. *United States,* 63 F. Supp. 1001 (D.D.C. 1948, three-judge court), aff'd. *per curiam* 327 U.S. 761, rehearing denied 327 U.S. 819. Moreover, in extreme situations the Commission has even suspended the reconsignment practice altogether during transportation emergencies, e.g., Service Order No. 207 1944), 9 F.R. 5316; Service Order No. 280 (1945), 10 F.R. 1459; Service Order No. 305 (1945), 10 F.R. 5651. See also Service Orders Nos. 115, Amendment 2, (1943), 8 F.R. 13262, and 160 (1943), 8 F.R. 14223, where the Commission held shippers subject to the sum of the local rates without reserving any hold time privileges whatsoever.

It was against this background that the Commission approached the problem created by excessive delays on reconsignment during the 1972–73 freight car crisis.

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[4] Service Order Nos. 692 and 858 were not located by Commission counsel until after the lower court had issued its opinion. The orders thus were not before the Court when it found (App. 65) that no such order had ever before been issued by the agency. These orders are attached as Appendix A.

B. ACTION TAKEN BY THE COMMISSION

By early 1973, the average daily shortage of 40-ft. wide-door, plain boxcars was 651 cars; of 50-ft. plain boxcars it was 2,234 cars. These are the cars most commonly used for loading lumber, plywood and related products. (App. 61). At the same time, field reports revealed that the average detention of cars of lumber and plywood at hold points was approximately ten days, and individual car delays of twenty to thirty days were frequently found (App. 60).

Determining that the acute car shortage was being exacerbated by the practice of excessive holding of lumber cars at reconsignment points, and that "such practices immobilize large numbers of freight cars needed by shippers for the transportation of other freight" (App. 15), the Commission, invoking its emergency powers, issued Service Order No. 1134.

The service order limited hold time at reconsignment points to five working days. It did not eliminate holding privileges entirely, as it could have. Only if the shipper held the car at the reconsignment point for more than five working days did he become subject to the sum of the local rates from origin, to hold point, to destination.

Thus, as long as the shipper sought only transportation and reasonable reconsignment services, there was no change whatsoever in the charge he must pay. Only when he used the boxcar, not for transportation but for warehousing, did the service order have any effect at all on his total bill. And considering the overriding need for freeing up scarce boxcars during the emergency, any additional charges paid for using the

cars as warehouses represented a *pro tanto* failure of the purpose of the order.[5]

C. DECISION OF THE COURT BELOW

Service Order No. 1134, served May 8, 1973, was to take effect on May 15, 1973. Instead of following the proper procedure of petitioning the Commission to reconsider its order,[6] the plaintiffs mounted their judicial attack on the effective date of the order.

After oral argument, the district court denied plaintiffs' motion for a temporary restraining order citing the "greater likelihood of irreversable harm by granting a temporary restraining order than by denying one." (App. 29).

After the subsequent hearing on the merits, however, the three-judge court set aside and vacated the service order. The lower court held principally that the order did not "purport to suspend any rule, regulation or practice then established in connection with car service," but rather "condoned" boxcar warehousing albeit at a higher rate (App. 68). The lower court also found expressed authority for "fixing shipping

[5] In this respect the Commission's rationale behind Service Order No. 1134 is similar to that underlying its action reviewed in *Atchison, T. & S.F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800. There the Commission's order, which allowed the railroads to impose an additional charge for in-transit inspection of grain, was not designed primarily to increase the carriers' revenue, but rather to provide an incentive to keep the scarce boxcars moving as transportation vehicles.

[6] See *United States* v. *Southern Railway Company*, 364 F. 2d 86, 91–93 (5 Cir.), *cert. den.*, 386 U.S. 1031; *United States* v. *Southern Railway Company*, 380 F. 2d 49, 54 (4 Cir.). The United States and the Commission did not raise this defense below, and are not raising it here.

rates and charges during a declared emergency under § 1(15) . . . utterly lacking. ." (App. 68). Finally, the court concluded that Service Order No. 1134 was a "rate fixing" order "developed through procedures lacking in due process." (App. 69).

SUMMARY OF ARGUMENT

1. Section 1(15) of the Interstate Commerce Act gives the Commission sweeping powers to issue car service orders when it is of the opinion that a transportation emergency exists. The Commission's service order authority pertains especially to the use made of vehicles of transportation. One of the major misuses of freight cars which the Esch Car Service Act (the origin of section 1(15)) addressed is the use of freight cars as warehouses.

Perceiving an emergency situation on top of the already chronic freight car shortage (a finding which the lower court did not dispute), the Commission issued a series of service orders. As pertinent here, it found that the excessive holding of lumber cars in transit was exacerbating the transportation crisis. Service Order No. 1134 was aimed at this use—or rather misuse—of the Nation's scarce boxcar fleet.

Service Order No. 1134 limited the hold time at reconsignment points to five working days. Since it did not eliminate hold time altogether, but rather, during the transportation emergency, left shippers the option of reconsigning their cars in a reasonable time period, Service Order No. 1134 cannot be held to be such a permanent rate order as to call into play the usual rate regulation procedures. Service Order No. 1134

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temporarily suspends the open-ended reconsignment rule in order to facilitate a more efficient use of the boxcar fleet and, as such, is fully in harmony with the Commission's car service authority.

2. Moreover, the foundation for the lower court's opinion is faulty. The lower court held that the Commission misused its section 1(15) authority because Service Order No. 1134 does not purport to suspend "any rule, regulation or practice then established in connection with car service." (App. 68). But the weight of authority holds that since section 6 of the Interstate Commerce Act, 49 U.S.C. 6, requires the filing of tariffs including rates and charges and "any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares, and charges," topics such as hold time limitation and accelerated charges for holding beyond the limited periods, both of which affect the aggregate of rates and charges, are "rules" within the contemplation of section 1(15)(a). Similarly, the lower court found no expressed authority "for fixing shipping rates and charges during a declared emergency under § 1(15)" (App. 68). This position also has been negated by the weight of authority holding that the Commission can temporarily effectively increase transportation charges to reach car service goals in emergencies.

3. The limitation imposed by the lower court on the Commission's emergency car service powers is particularly inappropriate in the current era of chronic freight car shortage. Since the freight-car fleet is inadequate to meet the present needs of the Nation, the

Commission must be left with a full array of remedial car service measures to direct the maximum transportation use of the boxcar fleet in the public interest during times of transportation emergency. This includes the power to devise remedial measures tailored to those situations where misuse of existing rules regarding the use of cars exacerbate overriding transportation emergencies.

ARGUMENT

SERVICE ORDER NO. 1134 WAS WELL WITHIN THE COMMISSION'S EMERGENCY AUTHORITY AND WAS RATIONALLY DESIGNED TO MEET A TRANSPORTATION CRISIS

A. SECTION 1(15) CONFERS BROAD AUTHORITY ON THE COMMISSION TO ISSUE ORDERS, IN EMERGENCY SITUATIONS, AFFECTING THE USE TO WHICH CARS ARE PUT

Section 1(15) of the Interstate Commerce Act, 49 U.S.C. 1(15), authorizes the Commission "with or without notice, hearing, or the making or filing of a report" to issue car service orders "[w]henever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists." That the Commission's authority is as sweeping as the literal language of the statute suggests can scarcely be questioned. As Mr. Justice Holmes stated in *Avent* v. *United States*, 266 U.S. 127, 130:

> The statute [now 1(15)] confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed.

The broad car service discretion vested in the Commission is confirmed by the legislative history of the *Esch Car Service Act,* 40 Stat. 101. See, e.g., H.R. Rep. 18, 65th Cong., 1st Sess. 7 (1917); S. Rep. 43, 65th Cong., 1st Sess. 2 (1917). Enactment of the Esch Car Service Act[7] was prompted by the severe car shortage that plagued the Nation during the World War I period. As a result of its investigation of the then-current freight car shortage (*Car Supply Investigation,* 42 I.C.C. 657), the Commission recommended to the Congress the enactment of remedial car service legislation. *30th Annual Report* 73–74, 91–92 (1916). The measures approved by Congress followed substantially the form recommended by the Commission. *31st Annual Report* 65 (1917). With the broadening of the Commission's powers enacted as part of the Transportation Act of 1920,[8] H.R. Rep. 456, 66th Cong., 1st Sess. 17, 27 (1919), the Esch Act's provisions are continued in sections 1(10)–(17) of the Interstate Commerce Act, 49 U.S.C. 1(10)–(17).

Under the Esch Act, while the Commission was given broad powers to correct problems of rail car shortage (55 Cong. Rec. 2021, 2022), the Commission's

[7] The legislative history of the Esch Car Service Act is found in 64th Cong., 2d Sess., H. Rep. 1553; 65th Cong., 1st Sess., H. Rep. 18; 65th Cong., 1st Sess., S. Rep. 43; 55 Cong. Rec. 2018–29, 2631–2, 2699–2701, 2823–4, 2857. Regarding the amendments made by the Transportation Act of 1920, see 66th Cong., 1st Sess., H. Rep. 456, p. 17; 58 Cong. Rec. 8315–6, 8529–31; 59 Cong. Rec. 3263.

[8] For a convenient statement of the legislative history of the portion of the Transportation Act of 1920 which broadens the Commission's car service authority, see *Peoria Ry. Co.* v. *United States*, 263 U.S. 528, 533, fn. 7.

essential duty was to assure that the railroads "used their present equipment systematically and so as to get from it the amount of service of which it is capable." S. Rep. No. 43, 65th Cong. 1st Sess. 4. In short, the concern of Congress was that the railroads utilize their present equipment more effectively and efficiently, rather than necessarily acquire additional equipment to relieve car shortages.

The use of freight cars as warehouses—the subject of Service Order No. 1134—was one of the main evils sought to be remedied by the original car service legislation. The debates in Congress clearly disclose that the practice of shippers using cars for storage rather than for transportation was regarded as one of the chief causes of the freight car shortage, which Congress intended the statute to reach.

In this connection, Mr. Esch, the sponsor of the legislation, declared (55 Cong. Rec. 2020–2021):

> Another cause of car shortage is the holding of cars on the part of shippers themselves, using the car as a species of warehouse, instead of promptly unloading it. I think that it is quite a universal evil throughout the United States, but it is due in some measure to the lack of warehouse and elevator facilities at the terminals. * * *
>
> Mr. MADDEN. If the gentleman will yield to me, I would like to ask him one question. I would like to ask the gentleman if there is any provision in this bill to compel railroad companies to pay demurrage to the shippers in case they failed to furnish the cars within the time they were required for the shipment of the goods?

Mr. ESCH. The gentleman means reciprocal demurrage?

Mr. MADDEN. This gives the Interstate Commerce Commission the right to authorize them to charge certain demurrage of the shipper if he fails to unload the car. Ought not the shipper to have a claim against the railroad company in case they fail to furnish the cars?

Mr. ESCH. I have no doubt under the proposed amendment, in case of emergency, the Commission could make any rules or regulations that they saw fit that would promote the transit of freight, because the power is very broad, and necessarily so.

The concern that the Commission have sufficient power over the use of cars is emphasized in the Transportation Act of 1920.[9] There the term "car service"

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[9] Thus, as Congressman Esch, Chairman of the House Committee on Interstate and Foreign Commerce, one of the chief sponsors of the legislation, stated in discussing the bill (H.R. 10453) on the floor of the House (58 Cong. Rec. 8315–16):

"Then we have in title 2 * * * a very material amendment to the car-service act. The car-service act was passed about May 1917, just too soon to become fully operative before Federal control began, so that the act has never had a fair chance of demonstrating its efficacy in the matter of car service. In the form in which we passed the act some two years ago it related only to the exchange, interchange and return of cars. We have enlarged that jurisdiction by saying that now the authority of the Commission shall include the use—note the force of every word:

"The term 'car service' in this act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives—"

That was not in the old act—"cars, and other vehicles"—

Which was not in the original act—"used in the transportation of property."

See also H.R. Rep. No. 456, 66th Cong., 1st Sess. 17 (1919).

was expressly defined to include the "use . . . of locomotives, cars, and other vehicles" (49 U.S.C. 1(10)).

That the Commission's car service authority extends to the "use" of cars was specifically recognized by the Court in *Peoria Ry.* v. *United States*, 263 U.S. 528. In that case, this Court clearly stated that " 'car service' connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them." (*Id.* at 533).

In its opinion, the lower court restrictively read this Court's opinion in *Peoria* to stand for the proposition that the "sole purpose" of 1(15)(a) and (b) is "to make [railroad cars] available in emergencies to a carrier other than the owner" (App. 68). But in *Peoria* the question presented was whether the Commission was authorized under its 1(15) emergency powers to issue orders compelling a terminal carrier to switch, by its own engines and over its own tracks, freight cars tendered by another carrier.[10] The appellant in *Peoria* conceded that the Commission's emergency powers apply to "the use to be made of railroad property," but argued that "no such authority is granted to require performance of a transportation service." (Id. at 532). This Court agreed, holding that 1(15) does not give the Commission authority to direct one carrier to perform switching services for another. It was in this sense that "transportation service"—here the performance of a switching service for another carrier—was held to be beyond section 1(15)'s reach. But the holding in no way negates the Commis-

[10] See *United States* v. *Michigan Cement Co.*, 270 U.S. 521, 527.

sion's broad discretion over the use of cars, as this Court recognized.

The lower court's further conclusion that this situation does not involve the "use . . . of . . . cars . . . by any carrier by railroad," within the meaning of Sections 1(10) and 1(14) on the theory that the misuse of reconsignment is a "use" of the cars by the shippers, rather than by the railroad, is a mere quibble over semantics. The end result is that the railroads here are "using" the cars to hold goods for excessive periods awaiting reconsignment, and the fact that this is done at the direction of the shipper does not change that result. And in any event it is clear that the Commission has the power, under Section 1(15), to direct its car service orders to shippers, as well as to railroads. See, *e.g.*, *Reading Company* v. *Commodity Credit Corp.*, 289 F. 2d 744, 748 (3 Cir. 1961).

In *Turner Lumber Co.* v. *C. M. & St. P. Ry.*, 271 U.S. 259, 262, this Court again emphasized that the Commission has broad powers to secure the efficient use of freight cars. Moreover, the Court additionally stated that undue detention of cars for storage is properly subject to remedial action:

> The efficient use of freight cars is an essential of an adequate transportation system. To secure it, broad powers are conferred upon the Commission. Compare *United States* v. *New River Co.*, 265 U.S. 533; *Avent* v. *United States*, 266 U.S. 127; *United States* v. *P. Koenig Coal Co.*, 270 U.S. 512. One cause of undue detention is lack of promptness in loading at the point of origin or in unloading at the point of destination. Another cause is diversion of the car from

> its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper to so use freight cars is obviously beyond the ordinary duties of a carrier * * *.

As *Turner Lumber* shows, the problem of undue detention by lumber shippers at reconsignment points is not a new one. The abuse of the lumber sales in transit practice has periodically created transportation emergencies calling for immediate action on the part of the Commission, including, as discussed *supra* at pp. 9–10, orders limiting reconsignment to a specific number of days.

We submit that Service Order No. 1134, which is designed to correct a specific misuse of boxcars by lumber shippers, is well within the Commission's authority to issue orders affecting the use to which cars are put. And, as we shall demonstrate, the mere fact that an incidental effect of the order may be to require a shipper who chooses to make excessive use of the boxcars for warehousing purposes to pay a higher rate in no way invalidates the order.

B. THE FACT THAT SERVICE ORDER NO. 1134 SUSPENDED A CAR SERVICE RULE THE EFFECT OF WHICH MAY BE TO CHANGE THE BILL A SHIPPER MUST PAY IF HE CHOOSES TO USE HIS LOADED BOXCAR AS A WAREHOUSE, DOES NOT INVALIDATE THE SERVICE ORDER, NOR DOES IT CHANGE ITS NATURE

The lower court's conclusion that Service Order No. 1134 is a rate order developed through procedures lacking in due process is based on two faulty prem-

ises: (1) that Service Order No. 1134 "does not purport to suspend any rule, regulation or practice then established in connection with car service" (App. 68); and (2) that "[e]xpressed authority to the Commission for fixing shipping rates and charges during a declared emergency under § 1(15) is utterly lacking and none can be rationally inferred or implied from the express language." (App. 68). Both bases for the court's conclusion are erroneous.

First, as to whether the service order suspended a car service practice or rule, we have shown earlier that the Commission's car service authority is particularly directed toward the use to which freight cars are put. In Service Order No. 1134 the Commission's emergency authority was exercised specifically to limit the use of lumber cars as warehouses. To reach this car service goal, the order had to suspend the practice of indefinite or open-ended holding allowed by the underlying demurrage tariffs. On a literal level, therefore, this car service practice relating to the use of the cars was the subject of, and was effectively suspended by, Service Order No. 1134.

Moreover, in the context of the Commission's emergency car service authority, it is now well settled that concepts such as "free time," hold time limits, and increased charges for holding beyond the time limits are car service "rules" within the contemplation of 1(15).

Directly in point is *Iversen* v. *United States,* 63 F. Supp. 1001, (D.D.C.), aff'd *per curiam* 327 U.S. 761, reh. den. 327 U.S. 819, where the court was faced with the question of whether terms like "free time" and the scale of demurrage charges are "rules" with

respect to the "the use, supply or movement of cars" (in other words "car service" as defined by 1(10)). *Id.* at 1003. At issue in *Iversen* were four of the Commission's service orders: two, ordering the railroads to increase their demurrage scale; one, directing the railroads to supplement their tariffs by including Sundays and legal holidays in the computation of free time on refrigerator cars; and a fourth—Service Order No. 396—employing precisely the same formulation used in the order here at issue, i.e., limiting reconsignment privilege to a specific number of days and providing that cars held in excess of that time would be subject to the sum of the local rates from origin to reconsignment point, to destination. The plaintiff in *Iversen* argued that matters such as this are not "rules" within the meaning of 1(15). The court disagreed, holding that, since section 6 of the Interstate Commerce Act, 49 U.S.C. 6, requires the filing of tariffs, including rates and charges and "any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges," items like demurrage, which affect the total transportation bill, are "rules" within the meaning of 1(15). *Id.* at 1006. It thereby sustained issuance of a service order identical to the one at bar, and the decision was thereafter affirmed by this Court.

The *Iversen* rationale, as affirmed by this Court, thereafter was specifically adopted by the Court of Appeals for the Fifth Circuit in *Armour & Co.* v. *Louisiana Southern Ry. Co.*, 190 F. 2d 925, 928 (5 Cir.), *cert. den* 342 U.S. 913. See also *Reading Company* v. *Commodity Credit Corp.*, 289 F. 2d. 744 (3

Cir. 1961), where the court upheld a service order limiting free time and accelerating demurrage charges.

It is thus clear, we submit, that when Service Order No. 1134, like the judicially-approved Service Order No. 396, suspended the tariff's open-ended reconsignment with demurrage, it suspended a "rule" established in connection with car service.

The lower court's second premise—that no power exists under Section 1(15) for the Commission to "fix" rates and charges during a declared emergency (App. 68)—is equally erroneous. In *Iversen* again, the plaintiffs argued that the term used in 1(15)(a), "rules, regulations, or practices," has no relation to the fixing of rates, fares or charges, 63 F. Supp. 1006. The court disagreed, holding valid three service orders (one in the precise form of No. 1134), which materially increased the shipper's transportation charges if freight cars were not quickly returned to the flow of commerce. Similarly, the court in *Armour & Co.* v. *Louisiana Southern Ry. Co., supra,* held that the Commission had emergency powers under section 1(15) to direct that new increased demurrage charges be placed in effect to accomplish car service goals during a transportation emergency. Indeed, even the court below in a previous three-judge review of a car service order brought by the present appellees, upheld the Commission's authority under section 1(15) to order the railroads to increase their demurrage charges during an emergency. See *Oregon Pacific Industries, Inc., et. al.* v. *United States* (Civil Action No. 69-249, D.

Ore.) and Service Order No. 1023 which it sustained."[11] It is simply too late in the day for the lower court inconsistently to assert that the Commission has no authority over shipping rates and charges under section 1(15) during a declared transportation emergency.

Thus, we submit, the two bases of the lower court's analysis are faulty, thereby erroneously leading to the conclusion that Service Order No. 1134 was issued through procedures lacking in due process.

C. THE LOWER COURT'S ACTION IN SETTING ASIDE SERVICE ORDER NO. 1134 SERIOUSLY AND UNWARRANTEDLY DIMINISHED THE COMMISSION'S EMERGENCY AUTHORITY TO DIRECT CAR SERVICE IN THE PUBLIC INTEREST

Service Order No. 1134 did not end the lumber marketing practice of sales in transit, nor did it suspend the lumber shippers' privilege of reconsignment. Rather, like the form of order approved in *Iversen, supra,* pp. 22–23, the service order merely put a reasonable time limit on the exercise of the reconsignment privilege.

In setting aside the service order as a presumably permanent rate order developed without due process, the lower court not only misconceived the purpose of No. 1134, it also cast grave doubt on the validity of this long-established form of remedial action. Any such limitation of the Commission's emergency authority should not be lightly countenanced in this period of chronic boxcar shortage.

As we have stated earlier, despite various regulatory and Congressional actions, the economy is being

[11] The orders of the Court and the Commission, which are unreported, are attached hereto as Appendix B.

restrained by a relatively inadequate boxcar fleet. Because of this underlying fact, which mirrors the situation that pertained when the original car service legislation was passed, the Commission's car service authority is a matter of critical and growing importance. The Commission must correspondingly be left with the broad car service discretion intended by Congress to direct the use of the scarce vehicles in the public interest during times of transportation emergency on top of the chronic shortage. The lower court, however, greatly limited that discretion.

The potential for abuse of the reconsignment privilege has been recognized by this Court. In *Turner Lumber Co.* v. *C. M. St. P. Ry.*, 271 U.S. 259, 262, this Court identified the "diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein" as a principal cause of undue detention of cars.

The problem of misuse of the sales-in-transit technique has continued unabated since Mr. Justice Brandeis wrote the *Turner Lumber* opinion. In the late 1950's the wholesalers abused their sales-in-transit technique by "rolling" their lumber to market over widely circuitous routes in order to obtain more time to ride the market. See *United States* v. *Union Pacific Railroad Company*, 173 F. Supp. 397 (S.D. Iowa 1959), aff'd *per curiam* 362 U.S. 327. See also Affidavit of appellees' witness (App. 47). While "slow rolling" is not an issue in the case at bar, undue detention at hold points remains an effective impediment

to the most efficient use of the boxcar fleet in a transportation emergency. And it was this impediment that Service Order No. 1134 addressed.

Service Order No. 1134 is of a type specifically tailored to meet those situations where shippers using a marketing in transit technique are excessively holding cars, contrary to the overriding public need to channel the cars back quickly into the stream of commerce. By setting limits to reconsignment privileges, the mechanism used in No. 1134 gives the Commission the means to adjust the needs of both reconsignment shippers and the shipping public generally.

Indeed, the action here taken by the Commission represents a careful accommodation of the legitimate needs of all shippers. The Commission did not, as it might have done,[12] order all reconsignment privileges terminated, with the full local or joint rates to apply when there was any interruption of the journey from origin to ultimate destination. Such a requirement, although clearly the most efficient from the standpoint of allocation of scarce transportation resources, would have imposed severe burdens on the lumber industry. At the same time, permitting the practice of mobile warehousing to continue unabated, despite the extreme transportation emergency, would accord unduly favorable treatment to one industry, at the expense of all other shippers. By permitting a reasonable five-day period for reconsignment under existing rules, and requiring a reversion to the full local or joint rates

[12] As noted *supra at* p. 10, the Commission has on occasion ordered reconsignment privileges suspended altogether during an extreme transportation emergency.

only if a shipper chooses to hold a car beyond that period, the Commission gave appropriate consideration to the needs of all shippers and its actions represented a reasonable accommodation of the diverse interests involved.

Moreover, the lower court's opinion goes far beyond a rejection of the particular accommodation here reached by the Commission. The lower court did not merely set aside No. 1134 because it thought it struck an arbitrary balance between the needs of the lumber wholesalers and the general public. Rather, the court threw out the whole adjustment mechanism altogether. This, we submit, was an unwarranted action in light of the legislative history behind the Esch Act, this Court's articulation of emergency discretion standards in the *Avent* case, and the realities of today's economy.

Service Order No. 1134 does not, as the lower court states, "deprive lumber and plywood shippers of the benefit of a long-standing railroad shipping practice." (App. 68). Sale-in-transit was not intended to be, nor was it, eliminated or suspended by Service Order No. 1134. Rather, the Commission merely imposed a reasonable time limitation on holding privileges, and thereby the exercise of reconsignment rules, during the transportation emergency. Transit lumber marketing remains a viable practice, and it and other types of transit marketing can be expected to continue in the future barring some now-unforeseen action. But at the same time, unfortunately, absent dramatic Congressional action, it appears that the chronic boxcar shortage will be with us into the foreseeable future.

In this light, the continued availability of the remedy embodied in No. 1134 is particularly needed.

The fact that the Commission did not choose to apply an available demurrage sanction (App. 65–6) in no way invalidates its choice of the previously approved formulation embodied in No. 1134. "[T]he choice of particular actions to carry out the broad policies stated by Congress" is a matter for the judgment and discretion of the Commission. *Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 809.

In essence, service orders such as the one at bar are adjustment mechanisms used to balance the needs of reconsignment sellers and of the general public in transportation emergencies of differing severity. If the Commission is deprived of this regulatory tool during this time of chronic shortage, it will be materially weakened in its ability to meet present and future emergencies. Nothing in the statute, or in the legislative history of the Esch Act, compels such a drastic result. The Commission, now more than ever, needs its full arsenal of emergency authority to direct the use of the strained boxcar fleet in the public interest.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed.

Respectfully submitted,

FRITZ R. KAHN,
General Counsel,
BETTY JO CHRISTIAN,
Associate General Counsel,
CHARLES H. WHITE, JR.,
Attorney,
Interstate Commerce Commission.

JUNE, 1974.

APPENDIX A

Title 49—TRANSPORTATION AND RAILROADS

CHAPTER 1—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

Part 95—Car Service

(Service Order No. 692)

Lumber—Restrictions on Reconsigning

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D.C., on the 6th day of March, A.D. 1947.

It appearing, that carload shipments of lumber are being held at points in the United States for diversion, reconsignment, or disposition orders, thereby impeding the use, control, supply, movement, distribution, exchange, interchange, and return of cars; the Commission is of opinion an emergency requiring immediate action exists in all sections of this country.

It is ordered, That:

§ 95.692 *Lumber—Restrictions on Holding for Diversion, Reconsignment or Disposition.*

(a) *Definition.* The term "lumber" as used in this order means lumber, veneer or forest products as listed in Items 26715 to 27135, inclusive, of Consolidated Freight Classification No. 17, supplements thereto or reissues thereof.

(b) *Holding of cars for diversion, reconsignment, or disposition orders, restricted.*

Carload shipments of lumber held in cars for diversion, reconsignment or disposition orders beyond two

days (48 hours), exclusive of Sundays and bank holidays, after the first seven a.m. (7:00 a.m.) after notice of arrival of the car at any point prior to delivery at the ultimate destination is sent or given the consignee or party entitled to receive same, and later reforwarded upon request of consignor, consignee, or owner, will be subject to the basis of charges shown in NOTE 1 of this paragraph.

NOTE 1.—The full local or joint (not proportional, reshipping or transshipping) tariff rate to the reforwarding point, plus the full local or joint (not proportional reshipping or transshipping) tariff rate from the reforwarding point, in effect on the date of shipment from point of origin, plus all other applicable charges previously or subsequently accruing.

(c) *Application* (1) The provisions of this order shall apply to intrastate and foreign shipments as well as to interstate shipments transported by any common carrier by railroad subject to the Interstate Commerce Act.

(2) The provisions of this order shall not apply to carload shipments of lumber billed from the primary point of origin prior to the effective date of this order.

(3) This order shall apply to a railroad freight car loaded with lumber stopped for partial unloading at a hold or reconsigning point when the order for the "stop for partial unloading" of such car is received by the carriers subsequent to the arrival of such car at the hold or reconsigning point.

(d) *Tariff provisions suspended—announcement required.*

The operation of all tariff rules and regulations insofar as they conflict with the provisions of this order is hereby suspended and each railroad subject to this order, or its agent, shall publish, file, and post

a supplement to each of its tariffs affected hereby, in substantial accordance with the provisions of Rule 9(k) of the Commission's Tariff Circular No. 20 (§ 141.9(k) of this chapter) announcing such suspension.

(e) *Special and general permits.* The provisions of this order shall be subject to any special or general permits issued by the Director of the Bureau of Service, Interstate Commerce Commission, Washington, D.C., to meet exceptional circumstances.

(f) *Effective date.* This order shall become effective at 12:01 a.m., March 21, 1947.

(g) *Expiration date.* This order shall expire at 11:59 p.m., June 30, 1947, unless otherwise modified, changed, suspended or annulled by order of this Commission.

It is further ordered, That a copy of this order and direction be served upon each State railroad regulatory body, upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement, and upon all other railroads not parties to that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Division of the Federal Register.

(40 Stat. 101, Sec. 402; 41 Stat. 476, Sec. 4; 54 Stat. 901; 49 U.S.C. 1 (10)–(17)).

By the Commission, division 3.

[SEAL] W. P. BARTEL, *Secretary.*

Title 49—TRANSPORTATION AND RAILROADS

CHAPTER I—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

Part 95—Car Service

Service Order No. 858

Lumber—Restrictions on Reconsigning

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D.C., on the 2nd day of August, A. D. 1950.

It appearing, that carload shipments of lumber are being held at points in the United States for diversion, reconsignment, or disposition orders, thereby impeding the use, control, supply, movement, distribution, exchange, interchange, and return of cars; the Commission is of opinion an emergency requiring immediate action exists in all sections of this country.

It is ordered That:

§ 95.858 *Lumber—Restrictions on Reconsigning.*

(a) *Definition.* The term "lumber" as used in this order means lumber, veneer or forest products as listed in Items 26715 to 27135, inclusive, of Consolidated Freight Classification No. 19, supplements thereto or reissues thereof.

(b) *Holding of cars for diversion, reconsignment, or disposition orders, restricted.*

Carload shipments of lumber held in cars for diversion, reconsignment, or disposition orders beyond three days (72 hours), exclusive of the holidays listed in Item 7 of Agent B. T. Jones' Tariff I.C.C. 4257, after the first seven a.m. (7:00 a.m.) after notice of arrival of the car at any point prior to delivery at the ultimate destination is sent or given the consignee or party entitled to receive same, and later reforwarded

upon request of consignor, consignee, or owner, will be subject to the basis of charges shown in NOTE 1 of this paragraph.

NOTE 1.—The full local or joint (not proportional, reshipping or transshipping) tariff rate to the reforwarding point, plus the full local or joint (not proportional, reshipping or transshipping) tariff rate from the refordwarding point, in effect on the date of shipment from point of origin, plus all other applicable charges previously or subsequently accruing.

(c) *Application.* The provisions of this order shall apply to intrastate, interstate and foreign commerce, including commerce with insular possessions and the territories of Alaska and Hawaii.

(2) The provisions of this order shall not apply to carload shipments of lumber billed from the primary point of origin prior to the effective date of this order.

(3) This order shall apply to a railroad freight car loaded with lumber stopped for partial unloading at a hold or reconsigning point when the order for the "stop for partial unloading" of such car is received by the carriers subsequent to the arrival of such car at the hold or reconsigning point.

(d) *Tariff provisions suspended—announcement required.*

The operation of all tariff rules and regulations insofar as they conflict with the provisions of this order is hereby suspended and each railroad subject to this order, or its agent, shall publish, file, and post a supplement to each of its tariffs affected hereby, in substantial accordance with the provisions of Rule 9(k) of the Commission's Tariff Circular No. 20 (§ 141.9(k) of this chapter) announcing such suspension.

(e) *Effective date.* This order shall become effective at 12:01 a.m., August 3, 1950.

(f) *Expiration date.* This order shall expire at 11:59 p.m., February 2, 1951, unless otherwise modified, changed, suspended or annulled by order of this Commission.

(g) *Reconsigning involving backhaul prohibited.* No common carrier by railroad subject to the Interstate Commerce Act shall reconsign or execute reconsigning orders when such reconsigning involves, requires or results in any backhaul, nor when such reconsigning requires or results in a car moving through or to a point where that car had previously been transported in through or continuous movement.

It is further ordered, That a copy of this order and direction be served upon each State Railroad regulatory body, upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement, and upon all other railroads not parties to that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Division of the Federal Register.

(40 Stat. 101, Sec. 402; 41 Stat. 476, Sec. 4; 54 Stat. 901; 49 U.S.C. 1(10)–(17)).

By the Commission, Division 3.

[SEAL] W. P. BARTEL, Secretary.

APPENDIX B

United States District Court for the District of Oregon

Civil No. 69-249

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN CO.; NORTH PACIFIC LUMBER CO., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION; WESTERN RAILROAD TRAFFIC ASSOCIATION: SOUTHERN FREIGHT ASSOCIATION; AND TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS, INTERVENOR-DEFENDANTS

ORDER

Plaintiffs' motion to supplement the record made before the Commission is denied on the ground that such evidence is not relevant or material.

IT IS FURTHER ORDERED that Service Order No. 1023, as amended, revised, and corrected, is affirmed. We find there is a rational and sufficient basis in the record before the Commission for such order and that the Commission did not act arbitrarily or capriciously.

IT IS FURTHER ORDERED that plaintiffs' action is dismissed.

Dated this 11th day of May, 1970.

/s/ GILBERT H. JERTBERG,
Circuit Judge.
/s/ GUS J. SOLOMON,
District Judge.
/s/ ROBERT C. BELLONI,
District Judge.

Title 49—TRANSPORTATION

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

Part 1033—Car Service

Service Order No. 1023

Demurrage on Freight Cars

At a Session of the Interstate Commerce Commission, Railroad Service Board, held at its office in Washington, D.C., on the 2nd day of April, 1969.

It appearing, That there are acute shortages of freight cars throughout the country; that certain carriers are unable to furnish an adequate supply of freight cars to shippers located on their lines; that these shortages of freight cars are impeding the movement of many commodities; that many freight cars are held by shippers for loading, unloading, or instructions for movement, in excess of the free time periods established by the applicable demurrage tariffs; that such practices immobilize large numbers of freight cars needed by shippers for transportation of other freight; and that the existing demurrage rules, regulations and practices of the railroads are ineffective with respect to the use, supply, control, move-

ment, distribution, exchange, interchange and return of freight cars to meet the requirements of shippers. It is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§ 1033.1023 *Demurrage on freight cars.*

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce and obey the following rules, regulations and practices with respect to its demurrage rules, practices and charges.

(b) *Description of Cars Subject to this Order.* Except as otherwise provided in paragraphs (c), (d) and (e) herein this order shall apply to freight cars which are subject to demurrage rules applicable to detention of cars.

(c) *Exception:* The provisions of this order shall not apply to freight cars listed in the Official Railway Equipment Register, I.C.C. R.E.R. 370 issued by E. J. McFarland, or reissues thereof, as having the following descriptions and mechanical designations:

Refrigerator Cars—Mechanical Designation: RA, RAM, RCD, RS, RSB, RSM, RSTC and RSTM.

Stock Cars—Mechanical Designation: SA, SC, SD, SF, SH, SM, SP and ST.

Tank Cars—Mechanical Designation: TA, TAI, TG, TGI, THI, TL, TLI, TM, TMI, TMU, TMUI, TP, TPI, TPA, TPAI, TR, TRI, TVI, TW and TWI.

(d) *Exception:* The provisions of this order shall not apply to cars exempt from demurrage rules, regu-

lations and charges as provided in Item 30 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer.

(e) *Exception:* The charges and provisions of Rule 8, Item 935 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer, supplements thereto or reissues thereof, or of similar rules or items in other demurrage tariffs lawfully in effect, will remain in effect for the periods defined in such rules or items.

(f) Cars subject to Section A of Rule 7, Item 930, Section 1 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer, supplements thereto or reissues thereof, after expiration of free time, or without free time where none is provided, shall be subject to demurrage charges at the following rates:

$5.00 per car per day or fraction of a day for each of the first four days.

$25.00 per car per day or fraction of a day for each of the next four days.

$50.00 per car per day for each subsequent day.

(g) Cars subject to Section A of Rule 9, Item 940, Section 1 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer, supplements thereto or reissues thereof:

When a car has accrued four debits, a charge of $25.00 per car per day, or fraction of a day, will be made for each of the next four days or fraction of a day and $50.00 per car per day, or fraction of a day will be made for all subsequent detention.

(h) Cars subject to Items 1320, 1322, 1355, 1357, 1360, and 1362 of Section 3 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer, supplements thereto or reissues thereof, after expiration of free time, shall be subject to demurrage charges at the following rates:

$5.00 per car per day or fraction of a day for each of the first four days.

$25.000 per car per day or fraction of a day for each of the next four days.

$50.000 per car per day or fraction of a day for each subsequent day.

(i) Cars subject to Items 1325 and 1327 of Section 3 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer, supplements thereto or reissues thereof, after expiration of free time, shall be subject to demurrage charges at the following rates:

$5.00 per car per day or fraction of a day for each of the first two days.

$25.000 per car per day or fraction of a day for each of the next four days.

$5.00 per car per day or fraction of a day for each subsequent day.

(j) Cars subject to Items 1330, 1332, 1350, 1352, 1365, and 1367 of Section 3 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer, supplements thereto or reissues thereof, after expiration of free time, shall be subject to demurrage charges at the following rates:

$7.00 per car per day or fraction of a day for each of the first two days.

$25.00 per car per day or fraction of a day for each of the next four days.

$50.00 per car per day or fraction of a day for each subsequent day.

(k) *Application.* The provisions of this order shall apply to intrastate, interstate, and foreign commerce.

(l) *Regulations Suspended—Announcement Required.* The operation of all rules and regulations, insofar as they conflict with the provisions of this order, is hereby suspended and each railroad subject to this order, or its agent, shall publish, file, and post a supplement to its tariffs affected hereby, in substantial accordance with the provisions of Rule 9(k)

of the Commission's Tariff Circular No. 20, announcing such suspension.

(m) *Effective date.* This order shall become effective at 7:00 a.m., April 15, 1969.

(n) *Expiration date.* This order shall expire at 6:59 a.m., July 1, 1969, unless otherwise modified, changed, or suspended by order of this Commission.

(Secs. 1, 12, 15 and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15 and 17(2). Interprets or applies Secs. 1(10–17), 15(4) and 17(2), 40 Stat. 101, as amended 54 Stat. 911; 49 U.S.C. 1(10–17), 15(4) and 17(2)).

It is further ordered, That copies of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board.

[SEAL] H. NEIL GARSON, *Secretary.*

U.S. GOVERNMENT PRINTING OFFICE: 1974

No. 73-1210

In the

Supreme Court of the United States

October Term, 1973

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLAND LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees.

On Appeal from the United States District Court for the District of Oregon

BRIEF AMICUS CURIAE of Western Railroad Traffic Association

June 10, 1974

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Portland, Oregon 97204
Counsel for Western Railroad Traffic Association, *amicus curiae*

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In the Supreme Court of the United States

October Term, 1973

No. 73-1210

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

OREGON-PACIFIC INDUSTRIES, INC., ARTHUR A. POZZI CO., TIMBERLAND LUMBER CO., CHAPMAN LUMBER CO., NORTH PACIFIC LUMBER CO., and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees.

On Appeal from the United States District Court
for the District of Oregon

INTEREST OF AMICUS CURIAE

Western railroads which are members of Western Railroad Traffic Association are primarily responsible for moving wood products from western mills to eastern markets, traffic which requires a sufficient supply of boxcars and other freight cars suitable for shipping lumber and plywood.1/ In October 1972 high do-

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1/ See *United States v. Allegheny-Ludlum Steel Corp.*, (1972) 406 US 742 at 750 discussing recurring car shortages affecting the wood products industry.

mestic demand and grain shipments to the U.S.S.R. combined to create a critical shortage of cars suitable for transporting grain and lumber, and the shortage grew progressively worse during 1973. By May, the average daily shortage of plain boxcars, which are used for both grain and wood products and are the "work horse of the car fleet," exceeded 13,000 cars (Comm Letter 5/14/73; Byrne aff). Much of the burden of the shortage fell upon members of Western Railroad Traffic Association.

The shortage was aggravated by inefficient car utilization practices employed by shippers.[2/] Among these practices is one referred to by the District Court as "sales-in-transit" marketing. Under this system, brokers who sell approximately 75% of all lumber and plywood produced in the nation (Cheatham affidavit) commonly ship loaded cars from western mills to reconsignment points prior to sale and without a destination. There the cars are held until completed sales — hopefully made in a rising market — permit the shippers to notify the carriers of their destinations. Under published tariffs, shippers receive the benefit of through rates to those points.

The practical effect of in-transit sales is to immobilize large numbers of cars by using them as ware-

2/ See *Atchison, Topeka & Santa Fe Railway v. Witchita Trade Board,* (1973) 412 US 800, 803 n. 2, 829 n. 1, 836.

houses, and the practice has been harshly criticized.[3/] The extent of this non-transportation use of cars is shown by appellees' evidence that they house 55,000 carloads of lumber in boxcars each year, and their contention that the economic effect of the order is to make them provide storage for an additional 2.5 million board feet of wood products (Cheatham affidavit).

Car Service Order 1134 was issued in May 1973 under Section 1(15) of the Interstate Commerce Act (49 USC Sec 1(15)) to afford relief from such practices during the emergency which had developed, by limiting hold time at reconsignment points to five days. After that period, through rates to final destinations would no longer apply and charges would be calculated by combining local rates. The order succeeded in its purpose. While it was in effect, shippers ceased to hold cars at reconsignment points for excessive periods. (Byrne affidavit)

The District Court's decree setting the order aside has had a substantial and adverse impact on the supply of cars available to the western lines. This, however, is not its entire significance. It nullified an important decision of the Commission which had been taken in the public interest to alleviate an emergency car shortage. In doing so, it gave no weight to the

3/ *Turner, Dennis & Lowry Lumber Co. v. Chicago M & S T P RR Co.*, (1926) 271 US 259 at 262.

Commission's duty under Section 1(15) "*** to act promptly on the spur of the moment in case of emergency,"[4/] and required it instead to follow procedures which have been criticized for involving "too many hearings and . . . too little action."[5/]

This Court should not merely analyze and sustain the order; it should support the Commission's determination to meet emergencies promptly and vigorously by effective temporary measures such as this, which supplement decisions under other provisions of the law that require a longer time to have their intended effect of improving the national car supply.

SUMMARY OF ARGUMENT

I

Car service orders, including emergency orders under Section 1(15), commonly affect published tariffs, regulate shippers and increase charges for transportation service. *Iverson v. United States,* (D DC 1946) 63 F Supp 1001, aff (1946) 327 US 767; *Armour & Co. v. Louisiana Southern Ry Co.,* (5th Cir 1951) 190 F2d 925 at 927, cert den (1952) 342 US 913. They are not limited to orders which fix demurrage charges or which regulate carriers as opposed to shippers. *Reading*

4/ See House Report 456, 66th Congress, 1st Sess at 17, quoted in *Peoria Ry. Co. v. United States,* (1923) 263 US 528 at 533, n. 7.

5/ See *United States v. Florida East Coast Railway Co.,* (1973) 410 US 224 at 232.

Co. v. Commodity Credit Corp., (3d Cir 1961) 289 F2d 744; *Armour & Co. v. Louisiana Southern Ry Co.*, (5th Cir 1951) 190 F2d 925, cert den (1952) 342 US 913. Their character as car service orders is established by their purpose to regulate the use and supply of cars. Section 1(10); *Peoria & Pekin Union Railway Co. v. United States*, (1923) 263 US 528. Their validity is not affected by any incidental effect on published tariffs, shippers, or charges for transportation services. Like all emergency orders, this one is controlled by the nature and duration of the emergency which called it forth, which provides sufficient protection against abuse of the Commission's authority under Section 1(15). *United States v. Thompson*, (ED Mo 1944) 58 F Supp 213.

II

Car Service Order 1134 is purely regulatory; its success is not measured by revenues it generates for carriers, but by its effect on shippers' use of cars. In substance, it does no more than limit hold time at reconsignment points. References in the order to local rates do not change it into a compensatory rate order, but merely explain the economic effect of limiting hold time. *Reading Co. v. Commodity Credit Corp.*, (3d Cir 1961) 289 F2d 744 at 748. The order supplements the Commission's long range efforts to eliminate car shortages through incentive *per diem* and other measures,

by providing temporary relief in an emergency. *United States v. Florida East Coast Railway Co.*, (1973) 410 US 224.

III

Circumstances arising from time to time can elevate the chronic shortage of cars in the national car pool into an emergency requiring immediate action in the national interest, and unwarranted limitations on the Commission's authority under Section 1(15) will cause hardship to shippers and carriers, and to the public. By requiring the Commission to employ lengthy hearing procedures before meeting the emergency in the way its judgment dictates, the District Court ignored the legislative history of the Esch Car Service Act and forced the Commission to adopt a course which has been harshly criticized and is inconsistent with the purpose of emergency measures.

The District Court's narrow definition of car service orders will apply equally to orders entered after limited hearing procedures under Section 1(14) and to emergency orders entered without hearing under Section 1(15). The unfortunate result of its decision is to require proceedings under Section 15 of the Act, which characterize changes of compensatory rates, before action deemed responsive to an emergency car shortage can be taken. However, it is not at all clear that such an

order is authorized under Section 15, and the Commission's authority to deal effectively with an emergency car shortage contributed to by sales-in-transit may exist only under Section 1(15).

ARGUMENT

I.

Car Service Order 1134 is a valid emergency regulation issued under Section 1(15) of the Interstate Commerce Act to improve car utilization.

The District Court attempted to distinguish between "car service orders" and "rate orders," holding that an emergency car service order to improve the use of cars by shippers cannot affect the application of published tariffs. Section 1(10) of the Act contains no such conceptual limitation on orders to control the use of cars, and none have been implied by the courts, which have refused to restrict the remedies available to the Commission to alleviate emergency car shortages.

1. *Car service orders can affect the application of published tariffs.*

Car Service Order 1134 is one of several orders which have been required from time to time during emergency car shortages to regulate shippers' use of cars by suspending published tariffs and increasing transpor-

tation charges. Thus, orders increasing demurrage charges paid by shippers and suspending published demurrage tariffs have been uniformly sustained.[6/] Such orders commonly establish car retention periods beyond which charges become burdensome, and they operate like this one, through temporary economic incentives to regulate the use of cars by shippers.

In *Iverson v. United States*, (D DC 1946) 63 F Supp 1001 at 1006, aff (1946) 327 US 767 the court held that orders suspending published tariffs which determine transportation charges are authorized by Section 1(15).[7/] Such orders are sustained because they "clearly provide an effective means of relieving a shortage of railroad freight cars." *Armour & Company v. St. Paul Railroad Company*, (5th Cir 1951) 190 F2d 925 at 927, cert den (1952) 342 US 913.

In *Reading Co. v. Commodity Credit Corp.*, (3d Cir 1961) 289 F2d 744 the court sustained Car Service Order 905, which provided economic incentives to improve car utilization by limiting free time to seven days. Un-

6/ E.g., Car Service Order 180 (October 2, 1944) sustained in *Iverson vs United States*, (D DC 1946) 63 F Supp 1001, aff (1946) 327 US 767; Car Service Order 775 (April 26, 1948) sustained in *Chicago, M. St. P. & P. R. Co. v. McCree & Co.*, (DC Minn 1950) 91 F Supp 57 and *Armour & Co. v. Louisiana Southern Ry. Co.*, (5th Cir 1951) 190 F2d 925, cert den (1952) 342 US 913; Car Service Order 905 (July 13, 1955) sustained in *Reading Company v. Commodity Credit Corp.*, (3d Cir 1961) 289 F2d 744.

7/ ". . . If a published rule or regulation affects or determines a charge, it is nevertheless a rule or regulation." *Id* at 1006.

like the present order, it did not contain any explanation of its effect on charges after that period. The court refused to limit emergency orders under Section 1(15) to those applying to demurrage charges and sustained the order as a proper and effective regulation of car use by affecting the application of published tariffs.[8/]

Such orders affecting published tariffs are designed to provide economic incentives to increase car utilization in an emergency. Their character as car service orders is established by their purpose, and is not changed by reason of the particular published tariff which may be involved. Such incentive regulation is an essential alternative to direct regulation, and it should be sustained as a reasonable measure which preserves to shippers continuing control over transportation charges which they will pay during periods of emergency.

2. *Car service orders can regulate shippers.*

The District Court's conclusion that Section 1(10)

8/ The court stated:

> ". . . Another cause [of car shortages] is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. If Order 905 were held to apply only to demurrage charges it would not have the effect of expediting the release of cars utilized by shippers for storage purposes. Thus, the Order would less efficiently accomplish its purpose of alleviating the critical shortage of box cars and refrigerator cars." 289 F2d at 748.

of the Act limits car service orders to rules affecting carriers, not shippers, is not required by its terms and has been rejected by the courts which have considered it. *Reading Co. v. Commodity Service Corp.*, (3d Cir 1961) 289 F2d 744 at 750 (order reducing free time from 20 to 7 days is legitimate regulation which forces shippers to reduce detention time at destination and at reconsignment points); *Armour & Co. v. Louisiana Southern Railway*, (5th Cir 1951) 190 F2d 925 at 927, cert den (1952) 342 US 913.

Clearly, the need for increased car utilization during periods of shortage requires authority to regulate shippers as to relevant matters which shippers control, principally the time required to return the car to the carrier for other transportation service. The retention of cars by shippers for non-transportation purposes burdens the national pool no less than delays by carriers in returning cars to originating lines. See *United States v. Allegheny-Ludlum Steel Corp.*, (1972) 406 US 742. The regulation of car use under the Esch Car Service Act must extend equally to both.

3. ***Car Service Order 1134 is a conventional regulation of car service.***

The District Court was concerned that Car Service Order 1134 constitutes an unprecedented use of the Commission's emergency power to deny shippers an es-

tablished business practice. However, the order is not an innovation. It is substantially identical in material respects to Service Order 858, which was promulgated in 1950 to alleviate an emergency car shortage affecting the lumber industry during the Korean War. It is also identical in its economic effect to demurrage and other orders referred to above, which control shippers' use of cars through economic incentives without the complete ban on given practices which is suggested by the District Court. In substance and effect, it is not different from orders which have preceded it and are an established part of the Commission's jurisdiction.

Peoria & Pekin Union Railway Co. v. United States, (1923) 263 US 528 does not support a narrow construction of Section 1(10) or suggest that car service orders cannot affect charges for transportation services or the application of published tariffs. In the *Peoria* case, the Court broadly defined "car service" as connoting "the use to which the vehicles of transportation are put; not the transportation service rendered by means of them." 263 US at 533.9/

9/ In *United States v. Michigan Portland Cement Co.*, (1925) 270 US 521 the Court limited *Peoria* to a restriction on the Commission's power to impose an "affirmative duty on another carrier" to perform switching services, and approved orders under Section 1(15) regulating "preference or priority" in transportation:

> ". . . It was in this connection that this court used the expression that car service connotes the use to which vehicles of transportation are put, but not the transportation

Car Service Order 1134 is a conventional and valid order for the regulation of car use, and it is authorized under 1(15) of the Act regardless of its incidental effect on published tariffs, its regulatory impact on shippers, and its indirect effect on transportation charges.

4. *Emergency car service orders are controlled by the duration and the nature of the emergency.*

Orders issued without hearing under Section 1(15) of the Act are by their nature limited in duration and narrow in scope; it is their temporary and limited nature and the conditions to which they respond which justify issuing them without following the limited procedural requirements of Section 1(14). See *United States v. Florida East Coast Railway Co.*, (1973) 410 US 224.

In this case, the record demonstrates the existence of a critical shortage of cars used to ship plywood and lumber and the need for immediate relief. Indeed, the District Court did not question the Commission's opinion that an emergency existed. Nor is there any doubt that the order was carefully tailored to the specific shortage which prevailed when it was issued. It affected only cars commonly used for shipping lumber

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service rendered by means of them. The opinion expressly affirms the authority of the Commission under ¶15 [sec 1 (15)] to give regulatory directions for preference or priority in transportation." 270 US at 527.

and plywood and was issued in the first instance for only six weeks. It could be extended only upon a rational determination that the emergency had not ceased and that such regulation was still necessary. *United States v. Thompson,* (ED Mo 1944) 58 F Supp 213.

Emergency orders do not pose a threat to established rate-making procedures or deprive shippers of any right they may have under published tariffs to use cars as warehouses. Because they are responsive to an emergency, the specific remedy adopted by the Commission will be limited[10/] as well as temporary. However, the fact that there is an emergency requires that the range of action available to the Commission be broadly conceived. The Commission has — and needs — wide discretion in selecting appropriate remedies to deal with such cases. It also follows that emergency orders are subject to only limited judicial review. *Daugherty Lumber Co. v. United States,* (D Or 1956) 141 F Supp 576. The controlling consideration is the congressional desire that the Commission should act promptly "on the spur of the moment in case of an emergency." *Peoria Ry. Co. v. United States,* (1923) 263 US 528 at 533, n. 7.

10/ See *United States v. Southern Ry. Co.,* (4th Cir 1967) 380 F2d 49:

> "The contours of a 'direction' issued in response to a specific emergency situation are necessarily shaped by the character of emergency." 380 F2d at 55-56, n. 7.

The Commission should be encouraged to follow that mandate, and the Court should not circumscribe action it can take in such cases. The Commission's power is broad, but it is sufficiently limited by the statute, which "confines the power of the Commission to emergencies and the requirement that the rule shall be reasonable in the interests of the public and of commerce fixes the only standard that is practical or needed." *Avent v. United States*, (1924) 266 US 127 at 130.

II

Car Service Order 1134 is not a rate order subject to Section 15 of the Act.

References in the order to the application of local rather than through rates after five days were unnecessary to its regulatory operation and had no visible purpose except to explain the result of limiting hold time to that period and to notify shippers of charges which should be considered in making their selling decisions at reconsignment points. The impact of the order is the same, with or without those references, and they cannot affect its character as a rule whose purpose is to regulate car use and increase car supply.

The purely regulatory purpose of the order is clear from its text, which describes the emergency that called it forth and its objective. Clearly, it would achieve

its purpose only if it did not generate revenue for carriers, and it would fail if it did so. The order is designed to discourage in-transit sales, not to compensate carriers for the use of their cars, and it is not its "only result * * * to cause payments to be made to the railroad by shippers." *Iverson v. United States*, (D DC 1946) 63 F Supp 1001, aff (1946) 327 US 767. Indeed, it was almost completely successful in eliminating excessive detention of cars prior to the decree of the District Court.

The effect of the order on the application of published tariffs does not deny shippers all freedom of choice as to rates they will pay for transportation services. An order like this one, which limits hold time, achieves its regulatory purpose without imposing on shippers an inflexible rule which arbitrarily bans in-transit sales or establishes flat increases in demurrage charges. This was a flexible and effective response to a critical situation, which did not become a rate order simply because it was reasonable. *Reading Co. v. Commodity Credit Corp.*, (3d Cir 1961) 289 F2d 744.

Emergency regulations such as Car Service Order 1134 are important supplements to the Commission's long-range program of action, including orders under Section 1(14), to alleviate the chronic shortage of cars in the national pool. *Investigation of the Adequacy*

of Freight Car Ownership, (1969) 335 ICC 264; *United States v. Allegheny-Ludlum Steel Corp.,* (1972) 406 US 742 at 746. Orders under Section 1(14), such as the one sustained in *Allegheny-Ludlum,* require time to achieve their purpose, and this Court recognized in that case that "the railroad and shippers were inflicted with an economic illness that might have to get worse before it gets better." 406 US at 754. See also *United States v. Florida East Coast Railway Co.,* (1973) 410 US 224. The Commission must depend heavily at this time on its emergency authority to meet temporary situations which may arise and threaten to turn a chronic shortage into a disaster for carriers, shippers and the public. The Commission's authority to handle these cases must extend to this kind of temporary incentive regulation of shipper practices which so decisively affect car supply.

III

The District Court's decision requires the Commission to proceed under Section 15 of the Interstate Commerce Act, which is a severe and unreasonable limitation of its authority to remedy emergency car shortages.

1. *Section 1(15) authorizes the Commission to regulate car use without a hearing to alleviate emergency car shortages.*

An underlying question in this case is whether an order regulating car use to alleviate an emergency car shortage can be issued without a hearing when it affects the application of published tariffs for transportation services, which in other instances would require proceedings, including hearings, under Section 15 of the Act. The effect of the District Court's decision is that it cannot, although the Act places no such limitation on orders under Section 1(15) and the courts have refused to do so.

When the Esch Car Service Act was before Congress, the report of the House Committee on Interstate and Foreign Commerce, HR Rep No 18, 65th Cong, 1st Sess at 7 (1917) emphasized the need for summary procedures and broad options to deal with emergency car shortages:

> "It may be objected that this [see 1(15)] authorizes a summary proceeding, but similar language may be found in section 15 of the interstate commerce act relating to the investigation of new schedules. The authority to make *just and reasonable direction with respect to car service during the emergency as in the opinion of the commission will best meet the emergency* and promote operation of car service in the interest of the public and the advantage of convenience and commerce of the people presents in general terms the main object for the enactment of the pending bill, and if through its enactment the operation of car service in the inter-

ests of the public and to the advantage of convenience and commerce of the people is secured its enactment is wise." (Emphasis added)

Present conditions in the industry do not suggest that the Commission's authority to respond promptly in such cases without a hearing has become less necessary. Indeed, this Court has recently held that the hearing required before issuing car service orders under Section 1(14) of the Act need not be adjudicatory in nature. *United States v. Allegheny-Ludlum Steel Corp.*, (1972) 406 US 742. See also *United States v. Florida East Coast Railway Co.*, (1973) 410 US 224, in which the Court took note of criticism of the Commission for "conducting too many hearings and taking too little action." 410 US at 232.

It is clear from the statute and from the decided cases that car service orders do not depend upon oral testimony and cross-examination, and that hearing procedures designed to determine "reasonable compensation for use" are unnecessary in proceedings for such orders. A corresponding liberality should be extended to orders under Section 1(15), which are the only summary proceedings authorized by the Act

to deal with emergency situations. The right to a hearing in rate proceedings under Section 15 should not inhibit or limit the scope of emergency orders under Section 1(15).

The District Court's view that Car Service Order 1134 can only be issued after hearings because it affects transportation charges unreasonably restricts the Commission's authority to deal with emergency car shortages and is not consistent with the Congressional purpose or with the views of this Court.

2. ***It is uncertain if a regulation limiting hold time is authorized by Section 15.***

As shown above, Car Service Order 1134 is a regulatory limitation on hold time which is limited in scope and duration. Consequently, there was no need to engage in lengthy proceedings under Section 15, which would be appropriate if it was an order to establish compensation to reimburse railroads for loss of use of cars held at reconsignment points.

We should add that it is not clear that a regulatory order of this kind, which does not contemplate increased revenue for carriers and would fail if there were any, is authorized by Section 15. This Court has recognized that in applying the National Transportation Policy (49 USC preceding Section 1) orders under Section 15 can

be shaped by regulatory considerations,[11/] including considerations of car supply.

However, it is difficult to find in the language of Section 15 authority to engage in regulation, as such, for purposes other than to determine reasonable compensation and to prevent or remedy unjust or discriminatory charges, and a purely regulatory order whose only purpose is to control the use of cars does not appear to be contemplated by Section 15. See *Palmer v. United States,* (D DC 1947) 75 F Supp 63 at 68. Certainly, orders such as this are commonly issued as car service orders under Section 1(14) or 1(15).

If the Commission cannot deal with in-transit sales effectively under Section 15 or through car service orders under its emergency power when circumstances require such action, it follows that it has little authority to deal with the matter at all. However, the practice of in-transit sales is a substantial factor contributing to car shortages, and the Court should not invite such a result.

11/ In *Atchison, T. & S. F. R. Co. v. Bd. of Trade,* (1973) 412 US 800 the Court considered increases in accessorial charges for in-transit grain inspections that were designed primarily to eliminate wasteful shipping practices in the grain industry. The Court recognized that the order was the result of car shortages which followed the Russian grain transaction, and three Justices described it as a "promising effort to solve a critical problem." 412 US at 836.

CONCLUSION

Car Service Order 1134 was a valid order under Section 1(15) of the Act, and the decree of the District Court should be reversed.

Respectfully submitted,

JAMES H. CLARKE,
Counsel for Western Railroad
Traffic Association, *amicus curiae.*

June 10, 1974

OGLESBY H. YOUNG
MARK S. DODSON
of Counsel

No. 73-1210

In the Supreme Court of the United States

OCTOBER TERM, 1973

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO., TIMBERLAND LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees.

On Appeal From the United States District Court for the District of Oregon

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

INTRODUCTION

This is a Brief submitted on behalf of the Appellees, plaintiffs in the Court below, in answer to the Brief submitted by Appellant, Interstate Commerce Commission, Intervenor in the Court below. This appeal is a direct appeal by the Interstate Commerce

Commission from a Decree of the U. S. District Court, for the District of Oregon, sitting as a Three-Judge Court pursuant to 28 USC 2321-2322, dated October 18, 1973, nullifying and enjoining the enforcement of an Order of the Appellant known as Service Order 1134. The United States of America, the Defendant in the Court below, which jointly with Appellant filed an Answer to the plaintiff's complaint and defended the validity of Service Order 1134 in the Court below, did not appeal, has now confessed error and has filed a Motion to Affirm the Decree of the United States District Court. Admittedly, Service Order 1134 was issued by the Appellant under the purported authority of 49 USC 1(15) without notice, hearing or opportunity to be heard.

I

Issue

The basic issue before this Court is, and before the Court below was, whether the Appellant exceeded the authority granted to it by 49 USC 1(15). The District Court held that Service Order 1134 was invalid because it exceeded the authority granted to Appellant by 49 USC 1(15). The Court below held it was an "illegal rate-fixing order developed through procedures lacking due process". (App. 69)

II

Description of Service Order 1134

The order in question, which was issued under

the purported authority of 49 USC 1(15), applies only to the transportation of lumber and plywood by railroad. It provides that in the event car load shipments of lumber or plywood are held at a transfer point more than 120 hours, and thereafter forwarded to another destination, or delivered to a newly designated consignee, that shipment will lose the benefit of any applicable through rate from the shipping point to the ultimate destination. As the District Court found,

> "The railroad joint or through shipping rate from the point of origin to the ultimate final destination is always substantially less than the combined or aggregate of short haul rates between intermediary points. For example, through rate for a 7500 lb. minimum carload from Pacific Coast shipping points to New York, via the intermediate points of Marshalltown, Iowa, and Chicago, Illinois, is $1432.50, while the aggregate of the three local rates between points totals $2452.00." (App. 65)

More examples of similar differences will be found in the Appendix at Pages 41-43.

III

Description of Marketing Procedures of Wholesale Lumber Industry and Economic Justification Therefor

The testimony of the Plaintiffs, in the form of a sworn statement by A. M. Cheatham, setting forth the practices of the wholesale lumber and plywood industries, indicate that while a very small proportion

of the lumber shipments from the West Coast would be affected by the order, the elimination of the use of hold points, which is the practical economic effect of the order, would be the require mills supplying Plaintiffs in this action alone to carry an additional 2.5 billion board feet of inventory. Aside from causing an impossible financial burden to the smaller mills particularly, such a requirement would have a drastic effect on lumber prices, particularly in a period of high demand. It thus appears the present marketing practices have a distinct and important benefit to the public and are not the result of some arbitrary whim of the lumber wholesalers or induced by sinister motives. It is a recognized, built-in mechanism of the established marketing pattern sanctioned by existing tariffs, which have the force and effect of law and which have been established in accordance with the usual practices of the Interstate Commerce Commission with all of the usual due process safeguards provided by normal Interstate Commerce Commission procedure. At any time during the many years the present marketing practices have been in existence, the railroads, or the Interstate Commerce Commission, could have instituted appropriate proceedings to amend the applicable tariffs so as to eliminate hold points. Of course, the proceedings would have required appropriate notice to all interested parties and hearing to develop satisfactory evidence to establish that such changes were in the public interest. Although the facts today are no different from those that have periodically arisen for the last fifty years,

the Appellant seeks to accomplish now by an ex parte proceeding, without notice, hearing or any right to judicial review, what it could have tried to do properly at any time in that period.

As the District Court found, based upon the Stipulation of the parties (App. 35), "the Commission has never in the past issued an order pursuant to the claimed authority of 49 USC 1(15)" which impose the sanctions upon shippers contained in the order or which purported to affect the rights of shippers to make use of a joint or through rate in effect pursuant to a duly filed and authorized tariff.

The Appellant's Brief (Pages 9-10), in order to excuse its actions in this case, cites Service Order No. 692 and Service Order No. 858 as similar to the order in the case at Bar. It should be noted that by stipulation of the parties (App. 35), the parties agree as follows:

> "7. The parties stipulate that the Interstate Commerce Commission has never in the past issued an order pursuant to the claimed authority of 49 USC 1(15), or which imposed the sanctions contained in Service Order 1134, or which purported to affect the rights of shippers to make use of a joint or through rate in effect pursuant to a duly filed and authorized tariff."

Even if true, the fact that the Appellant in the past may have issued an illegal order which was not contested, is no excuse for its actions in this case. However, in light of the solemn stipulation entered into between the parties, which is a part of the record of

this case, this Court should disregard this argument. (Appellant's Brief 10)

The Plaintiffs did not submit the testimony of Mr. Cheatham for the purpose of having the District Court, or this Court, decide whether hold points are, or are not, in the public interest. The Plaintiffs recognize that this decision must be made by the Interstate Commerce Commission. The testimony was submitted for the purpose of showing there are serious questions of public policy involved which can only be decided after notice and full consideration of the testimony of all interested parties. This is the statutory scheme of the Interstate Commerce Act as required by law except in very narrow areas with respect to which, Congress explicitly provided otherwise. To decide these very important and delicate questions of public policy on the basis of ex parte decisions, by faceless and nameless individuals, is not only in violation of the Interstate Commerce Act but is the very essence of arbitrary and capricious conduct.

IV

Legislative History of 49 USC 1(15)

49 USC 1(15), which is purported authority under which the Interstate Commerce Commission issued Service Order 1134, originated as HR 2035, 64th Congress, Second Session. The House Committee on Interstate Commerce of that Congress, which was the sponsor of the bill, issued a report favoring its passage (House Report 1553, 64th Congress Second

Session) but it was not passed in that session. An identical bill, known as HR 328, 65th Congress, First Session, was re-introduced and the House Interstate Commerce Commission issued a favorable report (House Report 18, 65th Congress, First Session). After minor verbal changes by the Senate, the bill was passed on May 29, 1917. The Act was amended in particulars not relevant to the problem before this Court by the Transportation Act of 1920 (see House Report 456, 66th Congress, First Session, Page 17). The Committee Reports in the 64th and 65th Congress are virtually identical and the conditions of the railroad industry and the problems relating to car shortages in the Reports are amazingly similar to what they are today. The House Committee in both Sessions of Congress (House Report 1553, 64th Congress, Second Session page 9 and House Report 18, 65th Congress, First Session page 8) stated that the purpose of the bill was to carry out the recommendations of the Interstate Commerce Commission in its Annual Report of December 1, 1916, as follows:

> "That the Commission be given definite and specific authority to prescribe for all carriers by rail subject to the Act, rules and regulations governing the interchange of cars, return of cars to owning railroads, the conditions and circumstances under which such cars may be loaded on foreign roads, and the compensation which carriers shall pay to each other for use of each other's cars. The carriers should be required to publish, post and file with the Commission under the provision of Section 6 of the Act, such

rules and regulations prescribed by the Commission and should be held to an observance of these rules and regulations just as they are held to the observance of their lawfully published, posted and filed rates."

It will be noted that the recommendation of the Commission dealt only with (1) interchange of cars; (2) return of cars to owning railroad; (3) conditions and circumstances under which such cars may be loaded on foreign roads; and (4) compensation which carriers shall pay to each other for the use of each other's cars.

The Commission did not recommend, nor did Congress intend to pass, legislation permitting the Interstate Commerce Commission, on an ex-parte basis, without notice or hearing, to alter existing tariffs so as to change the basis of transportation rates and practices. The appellant has stipulated that it has never in the fifty-six years since the enactment of 49 USC 1(15) or its predecessor issued a car service order which purports to have the same effect as Service Order 1134 (App. 35). This it is submitted is some evidence that the Commission has not considered the fact that it had such authority because the record of the Commission prior to the issuance of Service Order 1134 is replete with statements that the Commission was using all of its means and powers to cope with the continuous boxcar shortage. The letter of February 20, 1969, to Honorable Robert Packwood, Senator from Oregon, signed by Virginia May Brown, Chairman of the Interstate Commerce Com-

mission, is an example of the statements of the Commission over the course of years (App. 51-52).

V

Service Order 1134 Exceeds the Authority of the Interstate Commerce Commission Because It Directs a Change in Transportation Rates and Is Not a Service Order

One of the basic arguments of the Appellants in this Court, and which was the basis of the decision of the Court below, is that the Interstate Commerce Commission has exceeded its statutory authority in issuing Service Order 1134 without notice or hearing and without conforming to the due process provisions contained in the other sections of the Interstate Commerce Act. Putting it another way, Appellees' argument is that the Commission has changed the rates of transportation by use of a statutory provision which was never intended for such purpose and did not authorize the Commission to act in the manner it did.

The first and leading case construing the effect and extent of the authority granted to the Interstate Commerce Commission by 49 USC 1(15) is *Peoria and Pekin Railway Co.* v. *U. S.*, 263 U.S. 528. In that case, Justice Brandeis said, at 263 U.S. 534-535,

> "Transportation Act of 1920, evinces in many provisions the intention of Congress to place upon the Commission the administrative duty of preventing interruptions in traffic. But there is no general grant of emergency power to that end and the detail in which the subjects of such power have been specified, precludes its extension to other subjects by implication."

The rationale of the *Peoria* case is that the actions of the Interstate Commerce Commission can only be taken after hearing and notice unless there is very specific authority granted to the Commission to act without such hearing and notice with respect to the particular action taken by the Commission. The Court also held that the term "car service" had a very limited meaning and did not include transportation. In the later case of *U. S.* v. *Michigan Portland Cement Co.*, 270 U.S. 521, at 527, Chief Justice Taft, after referring to the *Peoria* case, states

> "It was held that the exercise of the emergency power of the Commission . . . was strictly to be construed. . . ."

The Court in the *Michigan* case upheld an order giving regulatory directions for preference of priority in the use of cars. This, of course, is an entirely different power than the Commission purported to use in the issuance of Service Order 1134. In the case of *Bodine and Clark Livestock Commission Co.* v. *Great Northern Railroad*, Court of Appeals, 9th Circuit, 63 F.2d 472, the Court stated,

> "While it may be conceded, however, that the language of the statute defining 'car service' it seems general in character, the Supreme Court has held that it is limited in scope solely to situations involving a purpose 'to make these [railroads]' instrumentalities available in emergencies to a carrier other than the 'owner.' "

The limited sense of the phrase "car service" in 49 USC 1(10), the defining paragraph, is elaborated

upon in the case of *Peoria and Pekin Union Railway Co.* v. *U. S.*, 263 U.S. 528, 533, 534, 44 S. Ct. 194, 196, 68 L. Ed. 427, in the following language,

> "The argument that the authority of the Commission over car service should be construed to include the requiring of switching rest upon paragraph 10 of the amended Section 1 of the Act to regulate commerce [49 USC 1(10)]. But car service connotes the use to which vehicles of transportation services rendered by means of them."

It will be noted that any authority granting the Commission the right to change "rates of transportation charges" or similar words as a part of its emergency powers are conspicuous by their absence. If the words of Justice Brandeis, at 236 U.S. 534, to the effect that,

> "Congress has given no general grant of emergency power unto the Commission and the detail in which Congress has spelled out the emergency power it did give, precludes the extension to other subjects by implication.",

mean anything, they mean that the Commission cannot change duly published rates of transportation pursuant to an emergency order without notice, hearing or any other safe guard normally relating to the rate-making procedure, by making use of what must be considered purely an implied grant of authority under the provisions of 49 USC 1(15). This Court has stated that 49 USC 1(15) contains no implied grant of authority previously, and it should reaffirm that holding likewise with respect to this order and

affirm the Decree of the Court below for that reason.

The Appellant attempts to make use of *Iversen* v. *U.S.*, 63 F. Supp. 1001, as authority for its order in this case, and makes the statement that in that case the Court "sustained the issuance of a service order identical to the one at Bar" (Appellant's Brief P. 23). This is a misleading statement. The *Iversen* case involved demurrage charges only, not charges for rates of transportation. The issue before this Court at this time was not even considered in the *Iversen* case. Furthermore, the Court in the *Iversen* case made it very clear that demurrage is entirely different from rate-making. To quote the court, (63 F. Supp. 1005)

> ". . . it seems clear that demurrage charges in part compensation and in part penalty; that in full character they are neither, not being rates as that term is used in connection with rate-making, nor penalties as that term is used in respect to penal impositions. They are sui generis. Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars. . . ."

This is exactly the point made by the Court below. Rules and regulations, as understood historically and textually, may refer to demurrage shares or penalties but not to rate-making. This Court, by affirming the *Iversen* case, (327 U.S. 761) affirmed the distinction which was made by the Court in the *Iversen* case as above quoted. The attempt to make use of the *Iversen* case as authority for the proposition that the Appel-

lant can use its emergency powers to issue a rule which affects rates of transportation is to distort the intent and meaning of the case. This was also the understanding of the Court in the case of *Chicago, Milwaukee & St. Paul Railroad* v. *McCree*, 91 F. Supp. 60, wherein the Court stated,

> "At the outset it should be noted that although it is common practice to speak of demurrage 'rates', to fix demurrage charges for the detention of equipment is not to fix a 'rate' as that term is used in the Interstate Commerce Act. . . ."

Thus, in the *Iversen* case, which was affirmed by this Court, and in *Chicago, Milwaukee & St. Paul Railroad* v. *McCree*, supra, the Courts drew a very firm distinction between demurrage charges and rates of transportation. With respect to demurrage charges, the Courts have held that they come within the term of "rules, regulations and practices." With respect to rates, the plain meaning of the decisions were that they do not. 49 USC 1(15) gives the Commission power with respect to rules, regulations and practices but not rates of transportation. This is what the Court below said in this case. The Court below specifically stated that demurrage charges for cars held at a given point over a stated time has been a traditional sanction upon shippers to keep the cars rolling, but Service Order 1134 went far beyond that by changing the rates of transportation (App. 64, 65, 66). It thus appears that the Court below in the case at Bar, followed the distinction that has been made in the *Iversen* case, supra, and the *Chicago, Milwaukee & St.*

Paul case, supra, between demurrage charges and rates of transportation.

VI

Service Order 1134 Exceeds the Authority of the Interstate Commerce Commission Because There is No Emergency as Required by 49 USC 1(15)

The Appellant claims that Service Order 1134 is a car service order which it had authority to issue under 49 USC 1(15). The court below held that it was not. The court held it was in effect an amendment to the tariff, passing as a car service order and the label given the action of the appellant was a mask to attempt to legitimize an action designed to by-pass normal due process procedures (App. 69). The appellees urge that this is the correct view of the situation. Even if it is not, the appellees contend the appellant exceeded its powers in other regards and the order should be set aside for that reason.

The entire statutory scheme of the Interstate Commerce Act and its statutory history makes it clear that "non-emergency" problems can only be dealt with by the appellant after appropriate hearings, notice, opportunity to be heard, judicial review and all of the other safeguards which normal administrative procedures have given affected parties and that these can be disregarded only in cases of "emergencies." (See *U. S.* v. *Thompson*, 58 F. Supp. 213, at 216.)

There are two sections of the Interstate Commerce Act authorizing the appellant to issue car service or-

ders. 49 USC 1(14) provides for all of the above normal administrative procedures, which admittedly were not used in this case. 49 USC 1(15), under which the appellant purported to act in this case, eliminates such safeguards in "emergency"' cases because of what was felt to be the overriding public necessity in such cases. (See House Report 18, 65th Congress, First Session) Even if the substance of Service Order 1134 came properly within the definition of the term "service order," the threshold question to be decided in this case is whether the appellant properly acted under the "emergency" section of the Interstate Commerce Act (49 USC 1(15). Obviously, merely calling a situation an emergency does not make it so. The use of the word "emergency" is subject to the same abuses as the invocation of other similar catch phrases, and this Court must have the ultimate right to determine whether the jurisdictional facts as shown in the record are present which authorize the appellant to exercise its "emergency" powers.

As Judge Hulen states in *U. S.* v. *Thompson*, 58 F. Supp. 213, at 216,

> "Abstractly stated, section 1, paragraph 15, Title 49 U.S.C.A., gives to the Interstate Commerce Commission unusual, drastic, and in some respects dictatorial powers. Powers of such character delegated to the Commission by this law can and should be exercised only on the basis that they are necessary to meet an emergency — an emergency that does not admit of time for notice and hearing to those whose property would be affected by the order. . . ."

The appellant's brief (pages 8-9) states that the practice which Service Order 1134 was designed to eliminate was the subject of a decision of the Commission as early as 1922. Thus, the Commission was well aware of the conditions and had at least fifty years within which to take appropriate action to eliminate this practice which it finds so objectionable. This is hardly the type of emergency situation which Judge Hulen finds to be necessary in order to bring into play the drastic remedy of 49 USC 1(15). It would appear that on the basis of the appellant's own brief, it had ousted itself of jurisdiction under this Section because, to paraphrase Judge Hulen, it had at least fifty years within which to give notice and hearing to those whose property would be affected by the order, to-wit: appellees.

The admission of facts in the record of this case (App. 33-36) and the undisputed evidence (Affidavit of A. M. Cheatham, App. 44-50) shows that the condition the appellant is attempting to deal with has existed for over fifty years and the industry practices have been in existence for over thirty-three years (See Appellant's Brief, pages 8-9). It would appear that a condition which has existed for over fifty years, which has been the subject of hundreds of actions by the appellant, can hardly be called an emergency which justifies ad hoc, ex parte, helter-skelter actions attempting to deal with the problem. If the actions of the lumber industry have had a material effect on the car shortage, the time is long past when the appellant should have invoked the nor-

mal provisions of the Interstate Commerce Act and have dealt with the subject on a long range basis, taking into account the interests of all of the parties involved, by having appropriate hearings and giving all parties an opportunity to be heard. At the same time, the Interstate Commerce Commission would benefit from the knowledge of witnesses concerning industry practices and economics which even the Interstate Commerce Commission, in its infinite wisdom, might not have available to it. This is what Congress intended when it so carefully required notice and hearing except in an "emergency."

This Court has never passed upon the question of whether the mere opinion of the Interstate Commerce Commission that an "emergency" exists justifying the use of 49 USC 1(15) precludes any judicial examination of the jurisdictional facts upon which the Interstate Commerce Commission purports to act.

It is true that a District Court in *Daugherty Lumber Co.* v. *U. S.*, 141 F. Supp. 576, seems to preclude such a threshold examination except when there is proof of "fraud, wrongdoing or capriciousness," and the language of the Court in *U. S.* v. *Southern Railway Company*, 364 F.2d 86, appears to follow this reasoning. It is submitted by the appellees, however, that such a standard is much too restrictive. It permits an administrative agency to determine its own jurisdiction and eliminates effective judicial review merely by incantation of the magic word "emergency."

The opinion of District Court Judge Hemphill, in *U. S.* v. *Southern Railway Company*, 250 F. Supp. 759,

particularly at pages 762-765, would appear to be a much more accurate statement of the law and be more in keeping with our traditions of judicial review and the limitation of administrative power. The scholarly analysis by Judge Hemphill of 49 USC 1(15) in the *Southern Railway* case, supra, should be so convincing to this Court that it should not hold that the usual rules of "jurisdictional facts" should apply with respect to 49 USC 1(15). To paraphrase Judge Hemphill, 250 F. Supp. 764,

> "The net effect of what happened is that the Commission is attempting to treat a continuous chronic problem which has existed . . . [for over 50 years] . . . as an emergency requiring immediate action."

Referring to the emergency powers granted to the Commission by 49 USC 1(15), Judge Hemphill further stated, *U. S.* v. *Southern Railway Company*, supra, 250 F. Supp. 759, at 764,

> "Nowhere in the voluminous legislative history is there any suggestion that this authority could be exercised in lieu of the regular rulemaking authority given by Section 1(14)."

To paraphrase Judge Hemphill again, 250 F. Supp. 764,

> "It is obvious that Service Order No. . . . (1134) . . . as amended, sought to deal with a chronic problem, not an emergency."

The decision of the U. S. Sourt of Appeals, Fourth Circuit, in *U. S.* v. *Southern Railway Company*, 380 F.2d 49, reversing Judge Hemphill does not impair

the authority of his statements relating to the subject matter discussed herein because the case was decided in the Court of Appeals on an entirely different ground not relevant to this case.

This Court has recognized the validity of the analysis of Judge Hemphill as above stated in that we are dealing with a chronic rather than an emergency situation and the cases of *U. S.* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 at 745, wherein it states, referring to the proceedings before the Commission in that case, that the Commission found that there was a continuous shortage of freight cars. Then it went on to say, (406 U.S. 745)

> "Underlying these chronic shortages of available freight cars, the Commission found, was an inadequate supply of freight cars owned by the Nation's railroads. . . ."

This Court also stated, in *U. S.* v. *Florida East Coast R. Co.*, 410 U.S. 230,

> "This case arises from the factual background of a chronic freight car shortage on the Nation's railroads. . . ."

This Court also stated in *U. S.* v. *Florida East Coast R. Co.*, 410 U.S. 231, quoting from Senate Committee on Commerce Report, 386, 89th Congress, 1st Session, 1-2,

> "Car shortages, which once were confined to the Midwest during harvest seasons, have become increasingly more frequent, more severe and nationwide in scope as the national freight car supply has plummeted."

Thus, the issue before the Commission is not one of an emergency requiring an immediate but temporary solution but a chronic one. 49 USC 1(15) was designed to handle a limited emergency on an extraordinary basis for a temporary period of time. It was not designed to be used as a continuous remedy for a chronic condition which could only be handled by the increase in the car supply-or other means on a long term basis. To make use of an emergency power to meet a long range problem may appear to be temporarily satisfying, but it violates every principle which we have been taught to believe concerning the nature of our government and its agencies. The use of "emergency" powers to solve a chronic problem of this kind is like using a drug requiring ever increasing doses to provide a cosmetic result but which has no effect on the disease itself. This was not the intent of the Congress when it enacted 49 USC 1(15).

This Court should be well aware of the lesson history teaches concerning continuous and indiscriminate use of "emergency" power. (See "A History of the Weimar Republic", Eric Eyck, Chapter IX, pages 254-257, Harvard University Press) To paraphrase Judge Hulen in *U. S.* v. *Thompson*, supra, the Commission in this case is making use of "unusual, drastic and in some respects dictatorial powers'" in an attempt to meet a chronic condition by distortion of a section of the law which was intended to only meet temporary emergency situations.

At any time during the last thirty-three years when the practices of the appellees have been admit-

tedly in existence, the appellant could have undertaken to follow the procedures authorized by the Interstate Commerce Act as established in *U. S. Allegheny-Ludlum*, supra. It could have conducted an inquiry and commenced a proceeding for the purpose of preventing what it claims to be the harmful practices employed by the appellees and persons in similar businesses and fashioned sanctions suitable to the requirements of the case.

Of course, if the appellant did so, it would be required to hear testimony, make findings and be subject to judicial review. This is one thing the appellant has at all costs attempted to avoid by invoking the magic word "emergency", and issuing ex parte orders subject to no review and without the benefit of any input from the industries involved. This is what this case is all about!

CONCLUSION

This Court should not countenance such proceedures any longer. It should affirm the judgment of the court below, both on the basis of the opinion of the court below and on the ground that the appellant, on the face of the record, has exceeded the powers granted to it under 49 USC 1(15) because there is no showing of an emergency in any rational sense of the word.

Respectfully submitted,

SEYMOUR L. COBLENS
Attorney for Appellees

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

INTERSTATE COMMERCE COMMISSION *v.* OREGON PACIFIC INDUSTRIES, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. 73–1210. Argued November 20, 1974—
Decided February 19, 1975

Service Order No. 1134, promulgated by the Interstate Commerce Commission (ICC) without notice or hearing pursuant to its emergency powers under § 1 (15) of the Interstate Commerce Act, which limited the holding time of lumber cars at reconsignment points to five working days and subjected the shipper holding the car at such points for more than that period to the sum of the rates from origin, to hold point, to destination, *held* within the ICC's power under § 1 (15) to avoid undue detention of freight cars used as places of storage, during an emergency freight car shortage that the ICC, exercising its expertise, found to exist. Pp. 4–7.

365 F. Supp. 609, reversed.

DOUGLAS, J., wrote the opinion for a unanimous Court. POWELL, J., filed a concurring opinion.

SUPREME COURT OF THE UNITED STATES

No. 73–1210

Interstate Commerce Commission, Appellant, *v.* Oregon Pacific Industries, Inc., et al.	On Appeal from the United States District Court for the District of Oregon.

[February 19, 1975]

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. CHIEF JUSTICE BURGER.

This is an appeal from a judgment of a three-judge District Court, 28 U. S. C. § 1253, which held invalid an order of the Interstate Commerce Commission promulgating a car service order [1] under § 1 (15) of the Interstate Commerce Act, 49 U. S. C. § 1 (15).[2] *Oregon*

[1] This Service Order by its original terms was to expire July 31, 1973, unless otherwise modified or changed by the Commission. 38 Fed. Reg. 12606. The Commission twice extended the deadline, 38 Fed. Reg. 19831, 31681, and on April 11, 1974, made it effective "until further order of the Commission," 39 Fed. Reg. 13971, on each occasion having found "good cause" for the extension. The April 11 amendment also suspended the Service Order indefinitely, effective April 15, 1974.

The Solicitor General without citation of any authority expressed his view that the District Court's decision was correct and moved that its judgment be affirmed. The Western Railroad Traffic Association has filed an *amicus* brief taking the opposing view.

[2] Section 1 (15) provides:

"Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders,

Pacific Industries v. *United States*, 365 F. Supp. 609 (Ore. 1973).

Lumber is often moved to market on a wholesalers' sale-in-transit schedule. Cars are sent to hold points, where in time reconsignment orders are received for shipment to customers of wholesalers. The tariffs allow indefinite holding, subject to demurrage charges for detention in excess of 24 hours, but the Commission found that these demurrage charges never discouraged shippers from lengthy holding of cars. In 1973 there was, according to the Commission, a transportation "emergency" which required "immediate action to pro-

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without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded."

mote car service in the interest of the public and the commerce of the people." — I. C. C. — (May 8, 1973). Accordingly the Commission, *sua sponte*, without notice and hearing, entered its Service Order No. 1134 which limited the hold time at reconsignment points to five days (120 hours), exclusive of Saturdays, Sundays, and holidays. If the lumber cars were held at reconsignment points longer than five working days, the reconsignment privilege would be lost and the shippers would be subject to local or joint tariff rates from the point of origin to the hold point, and from the hold point to the ultimate destination.

The District Court held that there were four categories of emergency action which the Commission could take under § 1 (15):

> "(a) to suspend . . . rules, regulations, or practices then established with respect to car service . . . ,
>
> (b) to make . . . directions with respect to car service . . . during such emergency as . . . will best promote . . . service . . . [and provide compensation as between carriers].
>
> "(c) to require . . . common use of terminals, . . . and
>
> "(d) to give directions . . . for preference or priority in transportation. . . ."

The District Court held that the Commission's authority under (b), (c), or (d) would not support the order in this case and that if the order were to be sustained it need be done under (a). It concluded that (a) was not adequate since the challenged order did not "suspend" any rule or regulation "with respect to car service." It reasoned that the order "condones the practice of sales-in-transit" for an indefinite time but requires shippers employing the practice to pay a higher rate to the carriers than the demurrage rate under the prior

order. That was, in its view, a rate order having no place under §§ (15) which gives the Commission power to act, *sua sponte*, in an "emergency" in a narrow group of cases. 365 F. Supp., at 612.

The District Court pointed out that § 1 (10) defines "car service" as "the use . . . movement . . . and return of . . . cars . . . used in the transportation of property . . . by any carrier by railroad"; and it emphasized that " 'car service' connotes the use to which the cars are put by the carrier not the transportation services rendered by them," *Peoria & P. U. R. Co.* v. *United States*, 263 U. S. 528, 533. We emphasized in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U. S. 742, 743, that car service rules dealt with the management of "a single common pool" of cars "used by all roads," and that they pertain to railroad use of cars. Since "railroad use" involves shippers, we think the District Court read the § 1 (15) too narrowly.

We noted in *Allegheny-Ludlum* that § 1 (15) traces back to the Esch Car Service Act of 1917.[3] 406 U. S., at 744. The use of freight cars as warehouses—the practice which prompted the Commission to act in the present case—was one of the evils at which the original Car Service Act, 40 Stat. 101, was aimed.

Mr. Esch, sponsor of the legislation, said: [4]

> "Another cause of car shortage is the holding of cars on the part of shippers themselves, using the car as a species of warehouse, instead of promptly unloading it. I think that it is quite a universal evil throughout the United States, but it is due in some measure to the lack of warehouse and elevator facilities at the terminals.
>
> . . . . . .

[3] See H. R. Rep. No. 18, 65th Cong., 1st Sess.; S. Rep. No. 65th Cong., 1st Sess.

[4] 55 Cong. Rec. 2020–2021.

"Mr. MADDEN. If the gentleman will yield to me, I would like to ask the gentleman if there is any provision in this bill to compel railroad companies to pay demurrage to the shippers in case they failed to furnish the cars within the time they were required for the shipment of the goods?

"Mr. ESCH. The gentleman means reciprocal demurrage?

"Mr. MADDEN. This gives the Interstate Commerce Commission the right to authorize them to charge certain demurrage of the shipper if he fails to unload the car. Ought not the shipper to have a claim against the railroad company in case they fail to furnish the cars?

"Mr. ESCH. I have no doubt under the proposed amendment, in case of emergency, the Commission could make any rules or regulations that they saw fit that would promote the transit of freight, because the power is very broad, and necessarily so."

And the Reports make clear that one aim of the Act was "to the end that the public may receive the best possible service in transportation."[5] Car shortages, it was found, resulted in short supplies of basic foods in the markets "with attendant high prices."[6] The interests of shippers and consumers—not the carriers alone—were very much in the forefront.

As we have noted, *Peoria Ry.* emphasized that the car service authority extends to the "use" of cars and not to "a transportation service," but there the issue was whether one carrier was bound to perform switching services for another carrier. The Court held that it was not; power over the "use" of cars, however, was left undisturbed. In this connection it is obvious that a shipper

[5] S. Rep., *supra*, n. 2, p. 2.
[6] H. Rep., *supra*, n. 2, p. 1.

by rail does not "rent" a vehicle as do shippers by truck. The cars are all "used" under the management of carriers, who naturally receive directions or requests from shippers. The cars cannot be used efficiently to serve the needs of shippers and consumers if they are used not as carriers but as warehouses.

In *Turner Lumber Co.* v. *Chicago M. & St. P. R. Co.*, 271 U. S. 259, demurrage to prevent "undue detention" of cars "loaded with lumber held for reconsignment" was fixed by the Commission without notice. The Court, speaking through Justice Brandeis, upheld the charge saying "All demurrage charges have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention." 271 U. S., at 262. In *Iversen* v. *United States*, 63 F. Supp. 1001, aff'd, 327 U. S. 767, the Commission entered a car service order limiting reconsignment privilege to a specific number of days and providing that cars held in excess of that time would be subject to the sum of the local rates from origin to reconsignment point to destination.[7]

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[7] *Iversen* involved four service orders of the Commission. Service Order No. 396 in that case was on all fours with the one in the instant case. In *Iversen*, Judge Prettyman speaking for a three-judge District Court said:

". . . [D]emurrage charges are in part compensation and in part penalty; . . . in full character they are neither, not being rates as that term is used in connection with ratemaking, nor penalties as that term is used in respect to penal impositions. They are sui generis. Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars. From the beginning they have been sustained as rules and regulations. They could not have been sustained as carrier charges or as penalties. As an integral part of the rules and regulations in respect to car service, they fall within

It was held that the demurrage item was a "rule" respecting "car service" within the meaning of § (15). The holding in *Iversen* was implicit in the holding in *Turner*.[8]

The District Court suggested that the service order was invalid because its effect was to "fix" rates and charges during an emergency—a power not covered by § 1 (15). That precise point was raised in *Iversen*, 63 F. Supp., at 1006, and the ruling, which we affirmed, was *contra*. Suspending or changing demurrage charges may increase the transportation charges; but as *Turner* makes clear, demurrage charges have a dual purpose; and it is enough if one of them is a deterrent against undue detention of cars. As we said in *Turner*, at times the cause of "undue detention" of freight cars is that they are used "as a place of storage, either at destination or at reconsignment points for a long period while seeking a market for the goods stored therein." 271 U. S., at 262. The substitution of tariff rates already fixed and on file for the old demurrage rate is not an unreasonable method of accelerating the movement of freight cars. That was the aim and purpose of the present service order; and it was promulgated in an "emergency" [9] which the Commission, using its expertise, found to exist. We cannot say the order was unreasonable on the record before us. Inso-

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the provisions of Section 1 (15) of the Interstate Commerce Act. It follows that when an emergency exists, the Commission can, without hearing, issue, effective for a limited time, orders in respect to these charges." 63 F. Supp. 1005–1006.

[8] The District Court distinguished Turner on the ground that it involved a "demurrage tariff duly filed" 276 U. S., at 260. But it was filed by reason of § 1 (15) during an "emergency" and, as in the present case, "without notice." *Id.*, at 260.

[9] A car service order of the Commission issued July 25, 1922, because of an "emergency" without notice and hearing was sustained in *Avent* v. *United States*, 266 U. S. 127, against the claim that the order violated the Fifth Amendment.

far as appellees raise questions of unfairness, they are precluded by the opinions of Justice Holmes in *Avent* v. *United States*, 266 U. S. 127, and of Justice Brandeis in *Turner Lumber Co.* v. *Chicago, M. & St. P. R. Co.*, 271 U. S. 259, which disposed of due process questions under § 1 (15). We therefore hold that the Commission had the power to promulgate Service Order 1134 summarily.[10]

Reversed.

[10] This is the only question we decide today. The Commission's present obligation with respect to the promulgation of car service rules, the issue that concerns our Brother POWELL, has not been raised by counsel here or in the court below, and, accordingly, is a matter we do not address.

SUPREME COURT OF THE UNITED STATES

No. 73–1210

Interstate Commerce Commission, Appellant, v. Oregon Pacific Industries, Inc., et al.	On Appeal from the United States District Court for the District of Oregon.

[February 19, 1975]

MR. JUSTICE POWELL, concurring.

I am in agreement with the Court's opinion that the Interstate Commerce Commission had the power under § 1 (15) summarily to take the action which is the subject of this litigation. I believe, however, that in addition to reversing the judgment of the District Court, we should direct that the case be remanded for a prompt proceeding under § 1 (14) of the Act.

The Commission entered Service Order 1334 on May 3, 1973, without notice, hearing or an opportunity by interested parties to submit evidence or grounds of objection. The Commission found, as it must under § 1 (15), that:

> ". . . An emergency exists requiring immediate action to promote car service in the interest of the public and commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest. . . ."

The Commission's counsel stated at oral argument that while the car shortage problem has a long history, the present order was in response to a particularly sharp but temporary increase in the severity of the problem. Counsel acknowledged, however, that this temporary

emergency has subsided and that the order has been maintained in effect largely because of this litigation.[1]

Summary action is justified by the need to prevent imminent and severe public harm, harm that could not be avoided were action delayed. In authorizing this type of action, Congress implicitly concluded that avoidance of the public harm justifies bypassing normal procedures. But the justification for summary action ends with the emergency that called it forth.

No reason has been given us why the normal procedures with respect to "car service" rules under § 1 (14) should not now be followed.[2] Although these do not require a full adversary hearing, due notice must be given all interested parties, with the opportunity to object, submit evidence and file briefs in support of their position. *United States* v. *Florida East Coast R. Co.*, 410 U. S. 224 (1972); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U. S. 742 (1972).

The Court's reversal of the District Court's decision, without more, will result in the vacating of its order of

[1] Although originally drawn to expire July 31, 1973, the Commission later continued it in effect, while suspending its application, "until further order of the Commission." 39 Fed. Reg. 13971. The order was vacated, however, by the District Court on October 18, 1973, some five-and-a-half months after its promulgation. Presumably, our reversal of the District Court will allow the Commission, in its discretion, to lift the suspension of the order without any renewed finding of emergency.

[2] The procedural safeguards afforded by § 1 (14), and which the Commission must follow absent an emergency, not only afford protection to the interests of private parties affected by agency action; they also insure that the agency has before it the information necessary to make a decision reasonably accommodating diverse and often competing public interests. Summary action may result in the imposition of hardships which, upon a more adequate consideration, will prove to have been unnecessary. See Freedman, Summary Action by Administrative Agencies, 40 U. Chi. L. Rev. 1, 27–30 (1972).

October 18, 1973, restraining enforcement of the Commission's emergency order of May 8, 1973. Absent the restraining order of the District Court, the emergency car service rules apparently will remain in effect. I think it unfortunate to leave the case in this posture. Accordingly, in addition to reversing the judgment of the District Court, I would direct that the case be remanded to the Commission with directions that it proceed promptly in accordance with the requirements of § 1 (14) to determine what changes, if any, are required in the car service rules.